Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE
Supreme Court of the United States
OCTOBER TERM, 1973

No. 73-1316

THE RENEGOTIATION BOARD,
Petitioner,

—v.—

GRUMMAN AIRCRAFT ENGINEERING CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 25, 1974
CERTIORARI GRANTED MAY 28, 1974

IN THE

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THE RENEGOTIATION BOARD,

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IN THE SUPREME COURT OF
THE UNITED STATES

No. 73-1316

THE RENEGOTIATION BOARD, PETITIONER

v.

GRUMMAN AIRCRAFT ENGINEERING CORPORATION

Appeal From Order of the United States Court of Appeals for the District of Columbia

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APPENDIX

RELEVANT DOCKET ENTRIES

1968

June 27—Complaint, appearance Exhibits A, B, C, D, E, F, & G. filed

Aug. 6—Motion of pltf. for summary judgment; c/m 8-6; affidavit of John F. Carr with exhibits 1 thru 8; statement; P&A; exhibits A thru C; M.C. filed

Aug. 26—Opposition of deft. to pltf.'s motion for summary judgment; c/m 8-26. filed

Aug. 26—Motion of deft. to dismiss or in the alternative for summary judgment; affidavit; statement; P&A; c/m 8-26; M.C. filed

RELEVANT DOCKET ENTRIES

1968

Sep. 9—Opposition of pltf. to deft's motion to dismiss; cross-motion for summary judgment; P&A; exhibit; c/m 9-9. filed

Nov. 8—Transcript of proceedings, 10-18-68, Vol. I, pp. 1-41 (reporter: Eva Marie Sanche. Court's copy.) filed

Nov. 4—Order denying pltf's motion for summary judgment and granting deft's motion for summary judgment. (N) Micro 11-7-68 Corcoran, J.

Dec. 5—Notice of appeal by pltf; deposit by Charles W. Colon $5.00; copy mailed to Irwin Goldbloom, Department of Justice. filed

1970

June 30—Motion of deft. for summary judgment; affidavit (3) statement; c/m 6-30-70;

Aug. 6—Motion of pltf. for an order in accordance with the mandate of USCA; P&A; exhibit A; c/m 8-6-70;

Aug. 6—Notice of pltf. to take depositions of Vernon James Dwyer, Geo. H. Vecchietti and Lawrence E. Hartwig; c/m 8-6-70.

Sep. 28—Withdrawal of taking of deposition of George J. Vecchietti and James Dwyer by pltf; c/m 9-28.

Oct. 1—Order denying motion of deft. for protective order as to Chairman Hartwig and holding motion for order in accordance with mandate pending outcome of Chairman Hartwig's deposition (N) Corcoran, J.

Jan. 22—Supplemental memorandum of P & A; by pltf in support of motion for an order in accordance with the mandate of the Court of Appeals; attachments A, B & C; c/m 1-22-71.

Mar. 16—Supplemental P & A of deft in support of motion for summary judgment and in opposition to pltfs' motion for order in accordance with the mandate of the Court of Appeals; attachments (2); c/m filed 3-11-71

RELEVANT DOCKET ENTRIES

1970

Apr. 26—Opinion denying Motion of Deft. for summary judgment and granting motion of Pltf. for order in accordance with mandate Order to be submitted within 10 days. (N) (Reporter—Eva Marie Sanche) J. Corcoran

May 18—Motion of deft for rehearing; affidavit; P & A; c/m 5-18-71; M.C. filed

June 4—Opposition of pltf. to motion for rehearing; P&A; exhibit A; c/m filed 6-4.

June 7—Order in accordance with mandate of U.S.C.A. (N) Corcoran, J.

June 15—Order denying motion of deft. for rehearing (N) Corcoran, J.

July 2—Motion of deft. for stay; no objection

Aug. 5—Notice of appeal by Deft from order of June 7, 1971; copy mailed Schamley

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1595-68

GRUMMAN AIRCRAFT ENGINEERING CORPORATION, Bethpage, Long Island, New York, PLAINTIFF

v.

THE RENEGOTIATION BOARD, DEFENDANT

COMPLAINT

I

This is a civil action to order the production of opinions and records under the Public Information Section of the Administrative Procedure Act, Public Law 90-23, 81 Stat. 54, U.S.C., Title 5, Section 552, Paragraphs 2(A) and (3) of Subsection (a) which provide, in part:

> (2) Each agency, in accordance with published rules, shall make available for public inspection and copying—
>
> > (A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;
>
> (3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. . . .

Jurisdiction is conferred on the Court by 5 U.S.C. Section 552(a)(3).

II

Plaintiff is a New York corporation with its principal office in Bethpage, Long Island, New York. Defendant is an agency of the United States of America with its

principal office in the District of Columbia. The opinions and records sought by this action are situated in this judicial district.

First Count

III

By letter dated April 26, 1968, copy attached hereto as Exhibit "(A)," Plaintiff requested that certain final opinions, orders and identifiable records (hereinafter collectively referred to as "opinions") of Defendant be made available by Defendant for inspection and copying.

IV

By letter dated April 30, 1968, copy attached hereto as Exhibit "B," Defendant, by its General Counsel, Howard W. Fensterstock, refused to make available said opinions for inspection and copying by Plaintiff.

V

By letter dated May 7, 1968, Plaintiff requested that Defendant review the General Counsel's refusal to furnish Plaintiff with the opinions referred to in Paragraph III, above.

VI

By letter dated May 21, 1968, copy attached hereto as Exhibit "C," Defendant upheld the action of the General Counsel and thereby refused to make available the opinions requested by Plaintiff as set forth in paragraph III, above. Said refusal constituted final action by Defendant with respect to Plaintiff's request.

VII

The refusal of Defendant to make available said opinions was contrary to and in violation of the requirements of Paragraphs (2)(A) and (3) of Subsection (a) of 5 U.S.C. Section 552. To the extent said refusal is based upon Regulations promulgated by Defendant under 5 U.S.C. Section 552, said Regulations are inconsistent with said statute.

VIII

Plaintiff has been caused and continues to be caused irreparable injury by Defendant's refusal to make available the opinions of Defendant referred to in Paragraph III, above.

Second Count

IX

By letter dated May 7, 1968, copy attached hereto as Exhibit "D," Plaintiff requested that certain identifiable records be made available by Defendant for inspection and copying.

X

By letter dated May 21, 1968, copy attached hereto as Exhibit "E," Defendant, by its General Counsel, Howard W. Fensterstock, refused to make available said records for inspection and copying by Plaintiff.

XI

By letter dated May 28, 1968, copy attached hereto as Exhibit "F," Plaintiff requested that Defendant review the General Counsel's refusal to furnish Plaintiff with the records referred to in Paragraph IX, above.

XII

By letter dated June 13, 1968, copy attached hereto as Exhibit "G," Defendant upheld the action of the General Counsel and thereby refused to make available the records requested by Plaintiff as set forth in Paragraph IX, above. Said refusal constituted final action by Defendant with respect to Plaintiff's request.

XIII

The refusal of Defendant to make available said records was contrary to and in violation of the requirements of Paragraph (3) of Subsection (a) of 5 U.S.C. Section 552. To the extent said refusal is based upon Regulations promulgated by Defendant under 5 U.S.C.

Section 552, said Regulations are inconsistent with said statute.

XIV

Plaintiff has been caused and continues to be caused irreparable injury by Defendant's refusal to make available the records of Defendant referred to in Paragraph IX, above.

WHEREFORE, in accordance with the provisions of paragraphs 2(A) and (3) of Subsection (a) of 5 U.S.C. Section 552, Plaintiff prays that:

(a) Defendant, its agents, employees and representatives be enjoined from withholding said final opinions, orders and identifiable records and be ordered to produce said final opinions, orders and identifiable records for inspection and copying by Plaintiff.

(b) Defendant's Regulations, Title 32, Chapter XIV, Subchapter B, Part 1480, of the Code of Federal Regulations, implementing 5 U.S.C. Section 552, be declared invalid to the extent inconsistent with said statute.

(c) The Court order such other relief as is just and equitable.

GADSBY AND HANNAH

By: /s/
CHARLES W. COLSON
Attorneys for Plaintiff

1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 223-9100

EXHIBIT "A"

April 26, 1968

The Renegotiation Board
Washington, D.C. 20446

Attention: Mr. Nathan Bass, Secretary to the Board

Subject: Renegotiation Proceedings
Grumman Aircraft Engineering Corporation
Fiscal Year ended December 31, 1965

Gentlemen:

We are in receipt of your letter of April 15, 1968, advising us that the Renegotiation Board has determined that this company realized excessive profits in the amount of $7,500,000 for the fiscal year ended December 31, 1965.

Because of the Board's adverse determination, it is apparent that we in some way failed to address ourselves in our appearance before the Board division assigned to the case to the important points or matters in this case. At the outset of our presentation before the division on April 8, 1968, we stressed that no specific points for presentation had been designated. Accordingly, we believe that the case has been prejudiced to our detriment by the failure of the Board in its letter of February 9, 1968, to provide us with a Notice of Points for Presentation as required by Sections 1472.4(c) and 1472.5 of the Renegotiation Board Regulations.

We now request that the Board, in order to correct this prejudicial procedural defect, comply with its regulations and provide this company with a Notice of Points for Presentation. Thereupon, we request that we be given the opportunity for another meeting with the Board division assigned to this case pursuant to Section 1472.4(c) of the Board's regulations and that the Board thereafter proceed with this case in compliance with its regulations.

In the event of your denial of the aforementioned request, we should like, in the alternative, to be provided with a summary of the facts and reasons upon which your determination of excessive profits is based pursuant to Sections 1472.4(d) and 1477.3 of the Board's regulations in order to assist us in determining whether or not we will enter into an agreement with the Board. In light of the fact that we have not been given a Notice of Points for Presentation, however, we are not in a position to state that we have submitted all the evidence believed to be relevant to the instant renegotiation proceedings.

As requested by your letter, we enclose herewith a copy of the face sheet of our New York State Franchise Tax Return for such fiscal year together with our computation of the state tax credit applicable to the tentative retained profits.

We also request, as further assistance in enabling us to determine whether to enter into an agreement with the Board, that, in accordance with 5 U.S.C. Section 552, the Renegotiation Board make available for our inspection and copying the final opinions, determinations, unilateral orders, agreements, clearance notices and letters not to proceed issued in the adjudication of renegotiation cases for the renegotiable years 1962 through 1965 involving the following companies:

Douglas Aircraft Company	Martin Marietta Corporation
The Boeing Company	General Dynamics Corporation
Lockheed Aircraft Corporation	McDonnell Company
Ling-Temco-Vought, Inc.	Northrop Corporation
North American Aviation, Inc.	Bell Aerospace Corporation
Fairchild Hiller Corporation	Litton Industries, Inc.
Republic Aviation Corporation	Avco Corporation

In this connection, we also request that we be given access to written summaries of the facts and reasons upon which such final opinions, determinations, unilateral orders and agreements have been reached.

In conclusion, we also request that we be provided with the final vote of each Member of the Board in the instant proceeding.

Very truly yours,

GRUMMAN AIRCRAFT ENGINEERING CORPORATION

JOHN F. CARR
Secretary and General Counsel

JFC:ms

EXHIBIT "B"

THE RENEGOTIATION BOARD
WASHINGTON, D.C. 20446

April 30, 1968

Grumman Aircraft Engineering Corporation
Bethpage
Long Island, New York 11714

Attention: John F. Carr, Esq.
Secretary and General Counsel

Subject: Renegotiation Proceedings
Grumman Aircraft Engineering Corporation
Fiscal Year ended December 31, 1965

Gentlemen:

The Board has received your letter of April 26, 1968, directed to Mr. Nathan Bass, Secretary to the Board, in which you make several requests in connection with the above-entitled renegotiation proceedings. Included in your letter was a request pursuant to the Freedom of Information Act, 5 U.S.C. 552. That portion of your letter containing such request has been referred to me pursuant to section 1480.7(b) of this Board's regulations.

You request that the Board make available to you, for inspection and copying, "the final opinion, determinations, unilateral orders, agreements, clearance notices and letters not to proceed issued in the adjudication of renegotiation cases for the renegotiable years 1962 through 1965 involving the following companies:

Douglas Aircraft Company	Martin Marietta Corporation
The Boeing Company	General Dynamics Corporation
Lockheed Aircraft Corporation	McDonnell Company
Ling-Temco-Vought, Inc.	Northrop Corporation
North American Aviation, Inc.	Bell Aerospace Corporation
Fairchild Hiller Corporation	Litton Industries, Inc.
Republic Aviation Corporation	Avco Corporation

You also request that you be given access to "written summaries of the facts and reasons upon which such

final opinions, determinations, unilateral orders and agreements have been reached."

I have concluded that the records you request are subject to the exemptions set forth in 5 U.S.C. 552(b)(3) and (4), and RBR 1480.9(a)(3) and (4). Further, the Board has specifically determined that records of the type requested in your letter are exempt. RBR 1480.9(b) provides, in part, as follows:

> (b) *Certain records.*—Without limiting the generality of the provisions of paragraph (a) of this section, the following are exempt:
>
> • • • • •
>
> (3) Determinations, unilateral orders, agreements, clearance notices, and letters not to proceed (see Part 1498 of this subchapter).

Your letter also requests that you be provided with the final vote of each member of the Board in the proceeding with your company. This request, too, is denied; the exemptions cited above are also applicable to the voting records of Board members with respect to exempt matters. See RBR 1490.8. Notwithstanding the foregoing, the Board vote in your case will be furnished by separate letter from the Secretary to the Board, but outside the framework of the Freedom of Information Act.

You are hereby advised, pursuant to RBR 1480.7(d), that your request for access to records of the Board, as set forth in your letter of April 26, 1968, is denied. Your attention is directed to the provisions of RBR 1480.7(e), providing for review by the Board of this decision if a written request therefor is made to the Secretary of the Board within 20 days after the date of this letter.

Very truly yours,

/s/ HOWARD W. FENSTERSTOCK
General Counsel

EXHIBIT "C"

THE RENEGOTIATION BOARD
WASHINGTON, D.C. 20446

Registered mail
Return receipt requested

May 21, 1968

Grumman Aircraft Engineering Corporation
Bethpage
Long Island, New York 11714

Attention: John F. Carr, Esq.
Secretary and General Counsel

Subject: Renegotiation Proceedings
Grumman Aircraft Engineering Corporation
Fiscal Year ended December 31, 1965

Gentlemen:

By letter dated May 7, 1968, you protest the action of the General Counsel, in his letter dated April 30, 1968, denying your request for access to certain information under 5 U.S.C. 552.

Pursuant to RBR 1480.7(e), the Board has reviewed the action of the General Counsel.

In the judgment of the Board, the records you have requested are exempt under the provisions of 5 U.S.C. 552(b), particularly paragraphs (3), (4), and (5) thereof. See RBR 1480.9(a). Specifically, certain of such records are within the exemption provided in RBR 1480.9 (b)(3).

The Board accordingly has upheld the action of the General Counsel and has decided that the records re-

quested in your letter will not be made available to you for inspection and copying.

Very truly yours,

/s/ NATHAN BASS
Secretary to the Board

cc: Charles W. Colson, Esq.
Messrs. Gadsby, Maguire & Hannah
Washington, D.C. 20006

EXHIBIT "D"

GRUMMAN AIRCRAFT ENGINEERING CORPORATION
BETHPAGE, LONG ISLAND, NEW YORK 11714

John F. Carr, Secretary and General Counsel

Cable Address: Grumair

May 7, 1968

The Renegotiation Board
1910 K Street, N.W.
Washington, D.C. 20446

Attention: Secretary to the Board, Mr. Nathan Bass

Subject: Renegotiation Proceedings
Grumman Aircraft Engineering Corporation
Fiscal Year ended December 31, 1965

Gentlemen:

Pursuant to 5 U.S.C. Section 552, we request that all of the reports, correspondence, and data contained in or constituting the files of the Eastern Regional Renegotiation Board and of The Renegotiation Board of the United States in connection with the renegotiation of Grumman Aircraft Engineering Corporation for the year 1965 be made available for inspection and copying.

Very truly yours,

GRUMMAN AIRCRAFT ENGINEERING CORPORATION
JOHN F. CARR
Secretary and General Counsel

JFC:c

EXHIBIT "E"

THE RENEGOTIATION BOARD
WASHINGTON, D.C. 20446

Registered mail
Return receipt requested

May 21, 1968

Grumman Aircraft Engineering Corporation
Bethpage
Long Island, New York 11714

Attention: John F. Carr, Esq.
Secretary and General Counsel

Subject: Renegotiation Proceedings
Grumman Aircraft Engineering Corporation
Fiscal Year ended December 31, 1965

Gentlemen:

By letter dated May 7, 1968, you have requested that the Board make available to you, for inspection and copying, pursuant to 5 U.S.C. 552, "all of the reports, correspondence, and data contained in or constituting the files of the Eastern Regional Renegotiation Board and of The Renegotiation Board of the United States in connection with the renegotiation of Grumman Aircraft Engineering Corporation for the year 1965." Pursuant to RBR 1480.7, your request has been referred to me.

RBR 1480.6(b) provides that a person who requests access to an identifiable record must provide a reasonably specific description of the particular record sought, and that the Board will not comply with a request that does not provide a sufficient description or with a general or blanket request.

In my opinion, you have not provided a reasonably specific description of particular records; rather, your request constitutes a general or blanket request for all files of the Board relating to the above-entitled proceeding. Further, I have concluded that the records you request

are, in whole or in part, within the exemptions provided in 5 U.S.C. 552(b), particularly paragraphs (2) through (5), and in RBR 1480.9(b).

Your request, therefore, is denied. I call your attention to RBR 1480.7(e), providing for review by the Board of this decision if a written request therefor is made to the Secretary of the Board within 20 days after the date of this letter.

Very truly yours,

/s/ HOWARD W. FENSTERSTOCK
General Counsel

cc: Charles W. Colson, Esq.
Messrs. Gadsby, Maguire & Hannah
Washington, D.C. 20006

EXHIBIT "F"

GRUMMAN AIRCRAFT ENGINEERING CORPORATION
BETHPAGE, LONG ISLAND, NEW YORK 11714

Cable Address: Grumair

The Renegotiation Board
1910 K Street, N.W.
Washington, D.C. 20446

Attention: Secretary to the Board, Mr. Nathan Bass

Subject: Renegotiation Proceedings
Grumman Aircraft Engineering Corporation
Fiscal Year ended December 31, 1965

Gentlemen:

This is to request review by the Board, pursuant to RBR 1480.7(e), of the General Counsel's decision under 5 U.S.C. § 552 communicated to us by letter of May 21, 1968.

The General Counsel states that our request of May 7, 1968, does not provide "a reasonably specific description of particular records . . ." Inasmuch as we have copies of all materials submitted by us to the Board in the instant proceedings and copies of all communications by the Board to us, the documents covered by our request are all other documents in the above-captioned file, including, for instance, reports received by the Board in the normal course of its business from customers of the contractor. In any event, we feel that our request of May 7, 1968, is sufficiently specific to enable employees of the Board to locate and make available for inspection and copying the material in question.

Furthermore, your General Counsel has concluded that the records we have requested "are, in whole or in part, within the exemptions provided in 5 U.S.C. 552(b), particularly paragraphs (2) through (5), and in RBR 1408.9 (b)." Since the records we requested were apparently sufficiently identifiable for him to have come to this conclusion, we are at a loss to comprehend the claim of lack of specificity.

In light of the foregoing, we urge that the documents included in our request to the Board of May 7, 1968, be made available for inspection and copying.

Very truly yours,

GRUMMAN AIRCRAFT ENGINEERING CORPORATION

/s/ JOHN F. CARR
Secretary and General Counsel

JFC/eas

EXHIBIT "G"

THE RENEGOTIATION BOARD
WASHINGTON, D.C. 20446

Registered mail
Return receipt requested

June 13, 1968

Grumman Aircraft Engineering Corporation
Bethpage
Long Island, New York 11714

Attention: John F. Carr, Esq.
Secretary and General Counsel

Subject: Renegotiation Proceedings
Grumman Aircraft Engineering Corporation
Fiscal Year ended December 31, 1965

Gentlemen:

Reference is made to your letter dated May 28, 1968, in which you requested a review, pursuant to RBR 1480.7 (e), of the decision of the General Counsel of the Board denying your request that the Board make certain information available to you for inspection and copying, pursuant to the provisions of 5 U.S.C. 552.

This will advise that the Board has upheld the decision of the General Counsel as stated in his letter of May 21, 1968.

Very truly yours,

/s/ NATHAN BASS
Secretary to the Board

cc: Messrs. Gadsby, Maguire & Hannah
Washington, D.C. 20006

• • • •

MOTION FOR SUMMARY JUDGMENT BY PLAINTIFF

Plaintiff moves the court as follows:

1. That it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in plaintiff's favor for the relief demanded in the Complaint on the ground that there is no genuine issue as to any material fact and that plaintiff is entitled to a judgment as a matter of law;

2. If summary judgment is not rendered in plaintiff's favor upon the whole case or for all the relief asked and a trial is necessary, that the court, at the hearing on the motion, by examining the pleadings and the evidence before it and by interrogating counsel, ascertain what material facts are actually and in good faith controverted, and thereupon make an order specifying the facts that appear without substantial controversy and directing such further proceedings in the action as are just. This motion is based upon:

(a) The Complaint with attached Exhibits "A" through "G".

(b) The supporting Affidavit of John F. Carr with attached Exhibits "I" through "VIII" filed herewith.

(c) The Statement of Material Facts As to Which Plaintiff Contends There is no Genuine Issue filed herewith.

(d) The Memorandum of Points and Authorities in Support of Motion for Summary Judgment with attached Exhibits "A" through "C" filed herewith.

GADSBY & HANNAH

By: /s/ CHARLES W. COLSON
Attorneys for Plaintiff

AFFIDAVIT OF JOHN F. CARR

District of Columbia, ss.

John F. Carr, being first duly sworn according to law, on oath deposes and says:

1. He is, and at all times hereinafter mentioned has been, Secretary and General Counsel of Grumman Aircraft Engineering Corporation.

2. As Secretary and General Counsel, deponent had the responsibility on behalf of plaintiff herein for supervising the renegotiation proceedings instituted by defendant herein against plaintiff herein for the fiscal year ended December 31, 1965.

3. During the course of the proceedings referred to in paragraph 2, above, your deponent, as Secretary and General Counsel of plaintiff herein, mailed to the defendant, herein, in the ordinary course of his duties, the letters attached hereto and incorporated herein as Exhibits "I", "IV" and "VI".

4. During the course of the proceedings referred to in paragraph 2, above, your deponent, as Secretary and General Counsel of plaintiff herein, received from the defendant herein, in the ordinary course of his duties, the letters attached hereto and incorporated herein as Exhibits "II", "III", "V", "VII" and "VIII".

Further deponent sayeth nothing.

/s/ JOHN F. CARR

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, this 6th day of August, 1968.

/s/ BONNIE PREVITE
Notary Public

My Commission expires: June 30, 1972

EXHIBIT "I"

April 26, 1968

The Renegotiation Board
Washington, D.C. 20446

Attention: Mr. Nathan Bass, Secretary to the Board

Subject: Renegotiation Proceedings
Grumman Aircraft Engineering Corporation
Fiscal Year ended December 31, 1965

Gentlemen:

We are in receipt of your letter of April 15, 1968, advising us that the Renegotiation Board has determined that this company realized excessive profits in the amount of $7,500,000 for the fiscal year ended December 31, 1965.

Because of the Board's adverse determination, it is apparent that we in some way failed to address ourselves in our appearance before the Board division assigned to the case to the important points or matters in this case. At the outset of our presentation before the division on April 8, 1968, we stressed that no specific points for presentation had been designated. Accordingly, we believe that the case has been prejudiced to our detriment by the failure of the Board in its letter of February 9, 1968, to provide us with a Notice of Points for Presentation as required by Sections 1472.4(c) and 1472.5 of the Renegotiation Board Regulations.

We now request that the Board, in order to correct this prejudicial procedural defect, comply with its regulations and provide this company with a Notice of Points for Presentation. Thereupon, we request that we be given the opportunity for another meeting with the Board division assigned to this case pursuant to Section 1472.4 (c) of the Board's regulations and that the Board thereafter proceed with this case in compliance with its regulations.

In the event of your denial of the aforementioned request, we should like, in the alternative, to be provided with a summary of the facts and reasons upon which

your determination of excessive profits is based pursuant to Sections 1472.4(d) and 1477.3 of the Board's regulations in order to assist us in determining whether or not we will enter into an agreement with the Board. In light of the fact that we have not been given a Notice of Points for Presentation, however, we are not in a position to state that we have submitted all the evidence believed to be relevant to the instant renegotiation proceedings.

As requested by your letter, we enclose herewith a copy of the face sheet of our New York State Franchise Tax Return for such fiscal year together with our computation of the state tax credit applicable to the tentative retained profits.

We also request, as further assistance in enabling us to determine whether to enter into an agreement with the Board, that, in accordance with 5 U.S.C. Section 552, the Renegotiation Board make available for our inspection and copying the final opinions, determinations, unilateral orders, agreements, clearance notices and letters not to proceed issued in the adjudication of renegotiation cases for the renegotiable years 1962 through 1965 involving the following companies:

Douglas Aircraft Company	Martin Marietta Corporation
The Boeing Company	General Dynamics Corporation
Lockheed Aircraft Corporation	McDonnell Company
Ling-Temco-Vought, Inc.	Northrop Corporation
North American Aviation, Inc.	Bell Aerospace Corporation
Fairchild Hiller Corporation	Litton Industries, Inc.
Republic Aviation Corporation	Avco Corporation

In this connection, we also request that we be given access to written summaries of the facts and reasons upon which such final opinions, determinations, unilateral orders and agreements have been reached.

In conclusion, we also request that we be provided with the final vote of each Member of the Board in the instant proceeding.

Very truly yours,

GRUMMAN AIRCRAFT ENGINEERING CORPORATION

/s/ JOHN F. CARR
Secretary and General Counsel

JFC:ms

EXHIBIT "II"

THE RENEGOTIATION BOARD
WASHINGTON, D.C. 20446

April 30, 1968

Grumman Aircraft Engineering Corporation
Bethpage
Long Island, New York 11714

Attention: John F. Carr, Esq.
Secretary and General Counsel

Subject: Renegotiation Proceedings
Grumman Aircraft Engineering Corporation
Fiscal Year ended December 31, 1965

Gentlemen:

The Board has received your letter of April 26, 1968, directed to Mr. Nathan Bass, Secretary of the Board, in which you make several requests in connection with the above-entitled renegotiation proceedings. Included in your letter was a request pursuant to the Freedom of Information Act, 5 U.S.C. 552. That portion of your letter containing such request has been referred to me pursuant to section 1480.7(b) of this Board's regulations.

You request that the Board make available to you, for inspection and copying, "the final opinion, determinations, unilateral orders, agreements, clearance notices and letters not to proceed issued in the adjudication of renegotiation cases for the renegotiable years 1962 through 1965 involving the following companies:

Douglas Aircraft Company	Martin Marietta Corporation
The Boeing Company	General Dynamics Corporation
Lockheed Aircraft Corporation	McDonnell Company
Ling-Temco-Vought, Inc.	Northrop Corporation
North American Aviation, Inc.	Bell Aerospace Corporation
Fairchild Hiller Corporation	Litton Industries, Inc.
Republic Aviation Corporation	Avco Corporation

You also request that you be given access to "written summaries of the facts and reasons upon which such final

opinions, determinations, unilateral orders and agreements have been reached."

I have concluded that the records you request are subject to the exemptions set forth in 5 U.S.C. 552(b)(3) and (4), and RBR 1480.9(a)(3) and (4). Further, the Board has specifically determined that records of the type requested in your letter are exempt. RBR 1480.9 (b) provides, in part, as follows:

> (b) *Certain records.*—Without limiting the generality of the provisions of paragraph (a) of this section, the following are exempt:
>
> • • • •
>
> (3) Determinations, unilateral orders, agreements, clearance notices, and letters not to proceed (see Part 1498 of this subchapter).

Your letter also requests that you be provided with the final vote of each member of the Board in the proceeding with your company. This request, too, is denied; the exemptions cited above are also applicable to the voting records of Board members with respect to exempt matters. See RBR 1490.8. Notwithstanding the foregoing, the Board vote in your case will be furnished by separate letter from the Secretary of the Board, but outside the framework of the Freedom of Information Act.

You are hereby advised, pursuant to RBR 1480.7(d), that your request for access to records of the Board, as set forth in your letter of April 26, 1968, is denied. Your attention is directed to the provisions of RBR 1480.7(e), providing for review by the Board of this decision if a written request therefor is made to the Secretary of the Board within 20 days after the date of this letter.

Very truly yours,

/s/ HOWARD W. FENSTERSTOCK
General Counsel

EXHIBIT "III"

THE RENEGOTIATION BOARD
WASHINGTON, D.C. 20446

Registered mail
Return receipt requested

May 21, 1968

Grumman Aircraft Engineering Corporation
Bethpage
Long Island, New York 11714

Attention: John F. Carr, Esq.
Secretary and General Counsel

Subject: Renegotiation Proceedings
Grumman Aircraft Engineering Corporation
Fiscal Year ended December 31, 1965

Gentlemen:

By letter dated May 7, 1968, you protest the action of the General Counsel, in his letter dated April 30, 1968, denying your request for access to certain information under 5 U.S.C. 552.

Pursuant to RBR 1480.7(e), the Board has reviewed the action of the General Counsel.

In the judgment of the Board, the records you have requested are exempt under the provisions of 5 U.S.C. 552(b), particularly paragraphs (3), (4), and (5) thereof. See RBR 1480.9(a). Specifically, certain of such records are within the exemption provided in RBR 1480-.9(b)(3).

The Board accordingly has upheld the action of the General Counsel and has decided that the records requested in your letter will not be made available to you for inspection and copying.

Very truly yours,

/s/ NATHAN BASS
Secretary to the Board

cc: Charles W. Colson, Esq.
Messrs. Gadsby, Maguire & Hannah
Washington, D. C. 20006

EXHIBIT "IV"

GRUMMAN AIRCRAFT ENGINEERING CORPORATION
BETHPAGE, LONG ISLAND, NEW YORK 11714

John F. Carr, Secretary and General Counsel

Cable Address: Grumair

May 7, 1968

The Renegotiation Board
1910 K Street, N.W.
Washington, D. C. 20446

Attention: Secretary of the Board, Mr. Nathan Bass

Subject: Renegotiation Proceedings
Grumman Aircraft Engineering Corporation
Fiscal Year ended December 31, 1965

Gentlemen:

Pursuant to 5 U.S.C. Section 552, we request that all of the reports, correspondence, and data contained in or constituting the files of the Eastern Regional Renegotiation Board and of The Renegotiation Board of the United States in connection with the renegotiation of Grumman Aircraft Engineering Corporation for the year 1965 be made available for inspection and copying.

Very truly yours,

GRUMMAN AIRCRAFT ENGINEERING CORPORATION

JOHN F. CARR
Secretary and General Counsel

JFC:c

EXHIBIT "V"

THE RENEGOTIATION BOARD
WASHINGTON, D.C. 20446

Registered mail
Return receipt requested

May 21, 1968

Grumman Aircraft Engineering Corporation
Bethpage
Long Island, New York 11714

Attention: John F. Carr, Esq.
Secretary and General Counsel

Subject: Renegotiation Proceedings
Grumman Aircraft Engineering Corporation
Fiscal Year ended December 31, 1965

Gentlemen:

By letter dated May 7, 1968, you have requested that the Board make available to you, for inspection and copying, pursuant to 5 U.S.C. 552, "all of the reports, correspondence, and data contained in or constituting the files of the Eastern Regional Renegotiation Board and of The Renegotiation Board of the United States in connection with the renegotiation of Grumman Aircraft Engineering Corporation for the year 1965." Pursuant to RBR 1480.7, your request has been referred to me.

RBR 1480.6(b) provides that a person who requests access to an identifiable record must provide a reasonably specific description of the particular record sought, and that the Board will not comply with a request that does not provide a sufficient description or with a general or blanket request.

In my opinion, you have not provided a reasonably specific description of particular records; rather, your request constitutes a general or blanket request for all files of the Board relating to the above-entitled proceeding. Further, I have concluded that the records you

request are, in whole or in part, within the exemptions provided in 5 U.S.C. 552(b), particularly (2) through (5), and in RBR 1480.9(b).

Your request, therefore, is denied. I call your attention to RBR 1480.7(e), providing for review by the Board of this decision if a written request therefor is made to the Secretary of the Board within 20 days after the date of this letter.

Very truly yours,

/s/ HOWARD W. FENSTERSTOCK
General Counsel

cc: Charles W. Colson, Esq.
Messrs. Gadsby, Maguire & Hannah
Washington, D. C. 20006

EXHIBIT "VI"

GRUMMAN AIRCRAFT ENGINEERING CORPORATION
BETHPAGE, LONG ISLAND, NEW YORK 11714

Cable Address: Grumair

May 28, 1968

The Renegotiation Board
1910 K Street, N.W.
Washington, D.C. 20446

Attention: Mr. Nathan Bass, Secretary to the Board

Subject: Renegotiation Proceedings
Grumman Aircraft Engineering Corporation
Fiscal Year Ended December 31, 1965

Gentlemen:

This is to request review by the Board, pursuant to RBR 1480.7(e), of the General Counsel's decision under 5 U.S.C. § 552 communicated to us by letter of May 21, 1968.

The General Counsel states that our request of May 7, 1968, does not provide "a reasonably specific description of particular records . . ." Inasmuch as we have copies of all materials submitted by us to the Board in the instant proceedings and copies of all communications by the Board to us, the documents covered by our request are all other documents in the above-captioned file, including, for instance, reports received by the Board in the normal course of its business from customers of the contractor. In any event, we feel that our request of May 7, 1968, is sufficiently specific to enable employees of the Board to locate and make available for inspection and copying the material in question.

Furthermore, your General Counsel has concluded that the records we have requested "are, in whole or in part, within the exemptions provided in 5 U.S.C. 552(b), particularly paragraphs (2) through (5), and in RBR 1480.9 (b)." Since the records we requested were apparently sufficiently identifiable for him to have come to this conclusion, we are at a loss to comprehend the claim of lack of specificity.

In light of the foregoing, we urge that the documents included in our request to the Board of May 7, 1968, be made available for inspection and copying.

Very truly yours,

GRUMMAN AIRCRAFT ENGINEERING CORPORATION

/s/ JOHN F. CARR
Secretary and General Counsel

JFC/eas

EXHIBIT "VII"

THE RENEGOTIATION BOARD
WASHINGTON, D.C. 20446

Registered mail
Return receipt requested

June 13, 1968

Grumman Aircraft Engineering Corporation
Bethpage
Long Island, New York 11714

Attention: John F. Carr, Esq.
Secretary and General Counsel

Subject: Renegotiation Proceedings
Grumman Aircraft Engineering Corporation
Fiscal Year Ended December 31, 1965

Gentlemen:

Reference is made to your letter dated May 28, 1968, in which you requested a review, pursuant to RBR 1480.7 (e), of the decision of the General Counsel of the Board denying your request that the Board make certain information available to you for inspection and copying, pursuant to the provisions of 5 U.S.C. 552.

This will advise that the Board has upheld the decision of the General Counsel as stated in his letter of May 21, 1968.

Very truly yours,

/s/ NATHAN BASS
Secretary to the Board

cc: Messrs. Gadsby, Maguire & Hannah
Washington, D.C. 20006

EXHIBIT "VII"

THE RENEGOTIATION BOARD
1910 K STREET, N.W.
WASHINGTON, D.C. 20446

STATEMENTS OF FACTS AND REASONS

Grumman Aircraft Engineering Corporation
Renegotiation Proceedings

Fiscal Year Ended December 31, 1965

I. DETERMINATION

As a result of renegotiaion under the Renegotiation Act of 1951, as amended, The Renegotiation Board has determined that Grumman Aircraft Engineering Corporation ("the contractor") realized excessive profits in the amount of $7,500,000 (subject to appropriate adjustment, if any, for State income taxes) which should be eliminated pursuant to the Act. In eliminating this amount, the contractor will be allowed, under Section 1481 of the Internal Revenue Code of 1954, a credit for Federal income taxes paid on the excessive profits to be eliminated. An order embodying the Board's determination was dated, issued and entered on May 21, 1968.

II. INTRODUCTION

The Eastern Regional Renegotiation Board on October 26, 1967 determined that the contractor realized excessive profits in the amount of $7500,000 and so notified the contractor. Since the contractor declined to enter into an agreement, the case was reassigned by the statutory Board to itself.

A division of the Board vsited the contractor's plants at Bethpage and Peconic, Long Island, in March, and on April 8, 1968 the division met with the contractor. Prior to such meeting, and pursuant to RBR 1472.5, the

contractor was furnished a Notice of Points for Presentation.

By contract types, the contractor's review year renegotiable sales and profits were as follows (000's omitted):

1965	Fixed Price	Fixed Price Incentive	CPFF	CPIF	Total*
	$	$	$	$	$
Sales	202,313	252,788	245,085	113,531	813,717
Profit	21,685	12,509	13,758	4,812	52,764
%	10.7	4.9	5.6	4.2	6.5

* Does not include no-fee facility contract billings of $48,000.

Special Matters

RBR 1477.4(e) provides that if any material issues of law or accounting have been raised in a renegotiation proceeding and have not previously been resolved with the contractor, such issues, and the disposition thereof, will be stated together with the reasons for such disposition.

Allocability of Commercial Research and Development Expense

For a number of years, the contractor has contended that part of its expenses for commercial research and development should be allocated to renegotiable business under the provisions of RBR 1459.8(e)(2)(ii); the review year expenses in question relate to the development of the Gulfstream II airplane.

On the basis of the evidence available to it, the Board is of the opinion that the Gulfstream was conceived and developed as a commercial venture with, perhaps, vague hopes of some sales to the Government. In fact, the contractor has consistently described the aircraft as a commercial venture and in its 1965 Annual Report to stockholders referred to the Gulfstream II as ". . . the world's fastest, longest-range aircraft designed exclusively for corporate use." Furthermore, as late as August 29, 1967, the contractor in a prospectus continued to classify the Gulfstream planes, both I and II, under the general heading of commercial products.

In view of the foregoing, the Board has refused to allocate any part of the commercial research and development expenses in question to renegotiable business as such costs do not qualify under RBR 1459.8(e)(2)(ii).

III. Statutory Factors

Character of Business

Contractor, for many years, has been a major designer, developer, and manufacturer of military aircraft, principally for the U.S. Navy. In addition, it has, as a prime contractor, had the responsibilities of a weapons system manager. In more recent years, including the review year, it has become a systems manager for aerospace vehicles for the National Aviation and Space Administration.

Navy prime contracts in the review year included:

A-6A Intruder, an all-weather jet attack plane
E-2A Hawkeye, an early warning plane
C-2A, a turboprop transport
S-2E Tracker, carrier-based antisubmarine plane
OV-1 Mohawk STOL, observation and reconnaissance plane

Major prime contracts for space projects included the Orbiting Astronomical Observatory and the Lunar Module for the Apollo moon landing. In addition, the contractor was a major subcontractor to General Dynamics for the F-111 fighter plane.

The major sales categories, which in the review year accounted for 95% of the renegotiable sales, were as follows (000's omitted):

Space (OAO and LM)	$336,970
Navy planes and spares	352,832
F-111 program	87,480
	$777,282

Renegotiable material costs, subcontracting, and items described by the contractor as direct charges, on an input basis, totaled $428,594,000, the equivalent of 64% of

manufacturing cost input as compared to $329,902,000, or 62% in the prior year.

In summary, contractor was a weapons system manager responsible for developing the system and for the successful mating of all components. In its aircraft programs, it generally manufactured the fuselage, the landing gear and airframe, while engines, wheels, brakes, propulsion and navigational equipment were either furnished by the Government or purchased from others. The estimated cost of Government-furnished material, not included in either sales or costs, was $86.3 million.

The majority of the aircraft as well as the spacecraft programs, were continuing, or follow-on from prior years. Also, as in prior years, the contractor continued its efforts to advance the state-of-the-art in its major areas.

The complex nature of the contractor's review year products has been recognized by the Board but the contractor has not been considered as a highly integrated producer.

Extent of Risk Assumed

Approximately 25% of the renegotiable sales were under firm fixed-price contracts, primarily for the OV, A-6A, E-2A, and S-2E planes, all of which represented continuing programs. The A-6A and the E-2A were produced under fixed-price incentive contracts. The fixed-price incentive review year sales, amounting to approximately 31% of renegotiable business, were, except for the F-111, also continuation programs. Although the F-111 program was started in a prior year, it was still in a development stage in the review year. Risk in this program was reduced by a clause (not invoked) in the subcontract under which the prime contractor agreed to reimburse the contractor up to a certain amount if the estimated costs proved to be too low and no follow-on orders were received. The balance of 44% of cost-type contracts carried minimal pricing risks, but did involve considerable technical risks because of the unknowns in the OAO and LM programs and the ever present possibility of termination. In October 1965, the CPFF contract for the LM was converted to a CPIF contract.

In view of the substantial amount of follow-on work and the increasing use of comparatively riskless, cost-type contracts, the Board is of the opinion that contractor experienced no unusual risks in the review year.

Contribution to the Defense Effort

The success of the A-6A in combat areas and the favorable progress of the LM were examples of contribution to the defense effort, even though part of the development may have been accomplishd in years prior to the review period. It is also recognized that some scientific advances from these and other development programs have been made available to other research centers. In the opinion of the Board, the contractor is entitled to moderate consideration under this factor.

Capital Employed

In arguing that its 1965 renegotiable profits were not excessive, the contractor has stressed its increased investment in additional facilities, as related to net income and as compared with the decreasing Government expenditures for facilities; the increasing extent to which short-term and long-term debt was used to finance overall operation; and, the return on allocated, beginning capital employed when compared to the returns in earlier years, after determinations.

The contractor has during its entire corporate existence specialized in defense work for the Government; in its early years, the bulk of its facilities were Government-furnished. In more recent years, the contractor has assumed greater responsibility for capital investments with the result that the increase in debt did impose more risk on the contractor's equity.

The increase in facilities did enable the contractor, with material help from the Government and its vendors, to increase its defense production, bringing with such increase vastly expanded renegotiable profits. The result in the review year was a return on beginning-of-the-year allocated net worth of 81%, a rate which, in the opinion

of the Board, clearly indicates the presence of excessive profits.

Significant Government capital assistance, without which the renegotiable volume of over $800 million could not have been attained, consisted of progress payments at the beginning of the year of approximately $140 million under fixed-price and fixed-price incentive contracts and Government-owned facilities of approximately $61 million. Furthermore, 44% of the review year renegotiable sales were under comparatively riskless, rapid-pay type contracts that put no great financial burden on the contractor.

Efficiency

From the information available to it, including personal observations at the contractor's plants, the Board is satisfied that the contractor's review year operations were conducted in a reasonably efficient manner, due in part to relatively high labor productivity. A low labor turnover rate was experienced. Nevertheless, the Board has received some reports of late deliveries. On balance, in the Board's opinion, the contractor is not entitled to exceptional consideration under RBR 1460.9.

Reasonableness of Costs and Profits

Costs

Although there were some overruns in the review year, on an overal basis it has been concluded that, at best, the contractor can be classified as an average cost producer.

Profits

Review year renegotiable sales were at an all-time high, greatly exceeding the volume in any prior year. They increased substantially over 1964. At the same time renegotiable profits increased at a much faster rate. This is shown by the following table:

	Sales	Profits	%
1965	$813,717	$52,764	6.5
1964	552,732	20,109	3.6
Increment	$260,985	$32,655	12.5

Thus an increase of 47% in sales was accompanied by an increase of 162% in the profits, and the profit margin on the incremental sales far exceeded the overall rate for 1964. Indeed, the profits on the incremental sales exceeded the contractor's total profits in any prior year in its history.

In our opinion, renegotiable profits of nearly $53 million are clearly unreasonable after full credit is given for all favorable factors such as developmental contribution, increased investment in plant, and added risks to equity. Consequently, the margin of profit must be adjusted as provided in RBR 1460.10(b)(3). The Board's determination fully and adequately recognizes the review year efforts of the contractor.

IV. Conclusion

Evaluating the foregoing under the several statutory factors, the Board has determined that the contractor realized excessive profits of $7.5 million during its fiscal year ended December 31, 1965. The effect of the determination is that the contractor will retain renegotiable profits of $45,264,088 on adjusted renegotiable sales of $606,265,029, or 5.6%; and will have adjusted returns of 21.2% and 69.5% on allocated capital employed and net worth, respectively.

/s/ Nathan Bass
Secretary to the Board

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STATEMENT OF MATERIAL FACTS AS TO WHICH PLAINTIFF CONTENDS THERE IS NO GENUINE ISSUE

Set forth below are the material facts as to which plaintiff contends there is no genuine issue.

1. Plaintiff is a New York City Corporation with its principal offices in Bethpage, Long Island, New York.

2. Defendant is an agency of the United States of America with its principal office in the District of Columbia.

3. By letter dated April 26, 1968, plaintiff requested that defendant make available for inspection and copying, the final opinions, determinations, unilateral orders, agreements, clearance notices and letters not to proceed issued in the adjudication of renegotiation cases for the renegotiable years 1962 through 1965 involving the following companies:

Douglas Aircraft Company	Martin Marietta Corporation
The Boeing Company	General Dynamics Corporation
Lockheed Aircraft Corporation	McDonnell Company
Ling-Temco-Vought, Inc.	Northrop Corporation
North American Aviation, Inc.	Bell Aerospace Corporation
Fairchild Hiller Corporation	Litton Industries, Inc.
Republic Aviation Corporation	Avco Corporation

In this connection, we also request that we be given access to written summaries of the facts and reasons upon which such final opinions, determinations, unilateral orders and agreements have been reached.

4. By letter dated April 30, 1968, defendant, by its General Counsel, Howard W. Fensterstock, refused to make available for inspection and copying by plaintiff the documents specified in paragraph 3, above.

5. By letter dated May 7, 1968, plaintiff requested that defendant review the General Counsel's refusal to furnish plaintiff with the documents specified in paragraph 3, above.

6. By letter dated May 21, 1968, defendant upheld the action of the General Counsel and thereby refused to furnish plaintiff with the documents specified in paragraph 3, above.

7. Said refusal constituted final action by defendant with respect to plaintiff's request.

8. By letter dated May 7, 1968, plaintiff requested that:

> all of the reports, correspondence, and data contained in or constituting the files of the Eastern Regional Renegotiation Board and of The Renegotiation Board of the United States in connection with the renegotiation of Grumman Aircraft Engineering Corporation for the year 1965 be made available for inspection and copying.

9. By letter dated May 21, 1968, defendant, by its General Counsel, Howard W. Fensterstock, refused to make available for inspection and copying by plaintiff the documents specified in paragraph 8, above.

10. By letter dated May 28, 1968, plaintiff requested that defendant review the General Counsel's refusal to furnish plaintiff with the documents specified in paragraph 8, above.

11. By letter dated June 13, 1968, defendant upheld the action of the General Counsel and thereby refused to furnish plaintiff with the documents specified in paragraph 8, above.

12. Said refusal constituted final action by defendant with respect to plaintiff's request.

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prices charged under the same contracts. This, of course, is acceptable evidence of the voluntary refunds and voluntary price reductions.

11. There are also instances where contractors state it is their general policy to make price reductions in order to maintain a set level of profit on the company's contracts with the Government Defense and Space Agencies.

Opposition to Plaintiff's Motion for Summary Judgment

Comes now the defendant, by its undersigned attorneys, and respectfully opposes plaintiff's Motion for Summary Judgment on the grounds that there is no dispute as to any material facts and defendants are entitled to judgment as a matter of law.

In support of this opposition, the Court is respectfully referred to the defendant's Motion to Dismiss or for Summary Judgment filed concurrently herewith, the Affidavit attached thereto, and the Memorandum of Points and Authorities in Support Thereof.

Respectfully submitted,

Edwin L. Weisl, Jr.
Assistant Attorney General

Harland F. Leathers
Irwin Goldbloom
Attorneys, Department of Justice
Attorneys for Defendants

• • • •

Defendant's Motion to Dismiss or in the Alternative for Summary Judgment

Comes now defendant, by its undersigned attorneys, and respectfully moves the Court, pursuant to Rules 12 and 56, F.R.Civ.P., for a dismissal of the action or for summary judgment on the grounds that there is no genuine issue as to any material fact and defendant is entitled to judgment as a matter of law since the records as to which access is requested are exempt from disclosure under 5 U.S.C. 552(b)(3)(4) and (5).

In support of these motions, the Court is respectfully referred to the Affidavit of Lawrence E. Hartwig, attached hereto, the Statement of Material Facts As to Which There Is No Genuine Issue, and the Memorandum of Points and Authorities filed herewith.

Respectfully submitted,

Edwin L. Weisl, Jr.
Assistant Attorney General

Harland F. Leathers
Irwin Goldbloom
Attorneys, Department of Justice
Attorneys for Defendants

• • • •

AFFIDAVIT

LAWRENCE E. HARTWIG, being first duly sworn, on oath deposes and says:

1. I am the Chairman of the Renegotiation Board and as such I am familiar with the files and records of such Board concerning the renegotiation proceedings of the Grumman Aircraft Engineering Corporation for its fiscal year ended December 31, 1965. Such files and records include the records of the Eastern Regional Renegotiation Board.

2. All of the correspondence between the Grumman Aircraft Engineering Corporation (hereinafter sometimes referred to as "Grumman") and the Renegotiation Board with respect to Grumman's request for access to records under 5 U.S.C. 552 is attached to plaintiff's complaint in Civil No. 1595-68 as Exhibits A through G.

3. I have examined the Board's files and records concerning the renegotiation proceedings of Grumman for its fiscal year ended December 31, 1965. The documents contained in such records and files fall into the following four categories:

A. Letters and documents submitted by Grumman to the Renegotiation Board regarding renegotiation proceedings for Grumman's fiscal year ended December 31, 1965, communications from the Renegotiation Board and its personnel to Grumman concerning renegotiation proceedings for Grumman's fiscal year ended December 31, 1965, and inter-agency communications relating to the establishment of a tax credit in connection with the determination of excessive profits for Grumman's fiscal year ended December 31, 1965. Access to the foregoing records is not in dispute. Grumman has specifically indicated that its request did not relate to material submitted by Grumman to the Board or communications from the Board to Grumman. (See Complaint, Ex. F.) The documents in this category are, however, available to Grumman if it desires to examine them.

B. Inter-departmental and inter-agency communications between the Renegotiation Board and other governmental agencies and Departments with respect to the performance by Grumman of its renegotiable business for its fiscal year ended December 31, 1965.

C. Communications between the Renegotiation Board and a customer of Grumman with respect to the performance by Grumman of its renegotiable business for its fiscal year ended December 31, 1965.

D. Intra-agency memoranda and communications consisting of advisory opinions, conclusions, recommendations, deliberations and analyses prepared by personnel and members of the Renegotiation Board in the performance of the decision-making process of the Renegotiation Board in carrying out its duties under the Renegotiation Act of 1951, as amended, with respect to renegotiation proceedings regarding Grumman's fiscal year ended December 31, 1965.

4. By its letter dated April 26, 1968, to the Renegotiation Board (Exhibit A to complaint), Grumman requested that the Board make available "the final opinions, determinations, unilateral orders, agreements, clearance notices and letters not to proceed issued in the adjudication of cases for the renegotiable years 1962 through 1965" of 14 corporations other than Grumman. Such letter also requested access to written summaries of the facts and reasons upon which such final opinions, determinations, unilateral orders and agreements were reached. To the extent such documents are contained in the files of the Renegotiation Board for such 14 corporations, the records contain information relating to income, profits, losses or expenditures of such corporations and the source thereof and may include information relating to trade secrets, processes, operations, and style of work of the various corporations. Such information has always been considered and treated by the Renegotiation Board as confidential information submitted by contractors subject to the Renegotiation Act of 1951, and the Renegotiation Board has always dealt with contractors on

the basis that financial information and information concerning their operations would be treated as confidential. Prior to the recent amendments (June 29, 1967, 32 F.R. 9226) of the Board's regulations governing the Availability and Control of Renegotiation Records and Information which were made in the implementation of the provisions of 5 U.S.C. 552, the regulations of the Renegotiation Board always provided that information and records of the nature described above in this paragraph were regarded and treated as confidential (Renegotiation Board Regulation, Part 1480, as issued March 25, 1952, 17 F.R. 2542, as amended, March 11, 1954, 19 F.R. 1370).

/s/ LAWRENCE E. HARTWIG

Subscribed and sworn to before me, a notary public in and for the District of Columbia, on this 23rd day of August, 1968.

/s/ JULIA S. MASKIE
Notary Public

My commission expires September 30, 1971.

STATEMENT OF MATERIAL FACTS AS TO WHICH DEFENDANT CONTENDS THERE IS NO GENUINE ISSUE

Set forth below are the material facts as to which the defendants contends there is no genuine issue.

1. Plaintiff is the Grumman Aircraft Engineering Corporation. In the course of renegotiation proceedings being conducted by the Renegotiation Board for Grumman's fiscal year ended December 31, 1965, Grumman requested access to records of the Board concerning the final opinions, determinations, unilateral orders, agreements, clearance notices of letters not to proceed issued in the adjudication of renegotiation cases for the renegotiable years 1962 through 1965 involving the following companies:

Douglas Aircraft Company	Martin Marietta Corporation
The Boeing Company	General Dynamics Corporation
Lockheed Aircraft Corporation	McDonnell Company
Ling-Temco-Vought, Inc.	Northrop Corporation
North American Aviation, Inc.	Bell Aerospace Corporation
Fairchild Hiller Corporation	Litton Industries, Inc.
Republic Aviation Corporation	Avco Corporation

This request was contained in a letter to the Board dated April 26, 1968 (Exhibit A to Complaint).

2. Thereafter, by letter of May 7, 1968, Grumman also requested access to:

> all of the reports, correspondence, and data contained in or constituting the files of Eastern Regional Renegotiation Board and of the Renegotiation Board of the United States in connection with the renegotiation for Grumman Aircraft Engineering Corporation for the year 1965 . . . [Exhibit D to Complaint].

3. By its letter of May 28, 1968 (Exhibit F to Complaint), Grumman clarified its request to the Board by stating that its request for access to the Board's files did not relate to materials submitted by Grumman to the Board in connection with the renegotiation proceedings or to materials and communications from the Board to Grumman.

4. By letters dated May 21, 1968, and June 13, 1968 (Exhibits C and G to Complaint), the Renegotiation Board advised plaintiff that its requests for access to records had been denied on the grounds that the records requested are exempt from disclosure under the provisions of 5 U.S.C. 552(b)(3), (4), and (5) and applicable regulations of the Renegotiation Board.

5. The files and records of the Renegotiation Board concerning renegotiation proceedings for Grumman's 1965 fiscal year contain documents which fall into the following categories (Hartwig's Affidavit):

A. Letters and documents submitted by Grumman to the Renegotiation Board regarding renegotiation proceedings for Grumman's fiscal year ended December 31, 1965, communications from the Renegotiation Board and its personnel to Grumman concerning renegotiation proceedings for Grumman's fiscal year ended December 31, 1965, and inter-agency communications relating to the establishment of a tax credit in connection with the determination of excessive profits for Grumman's fiscal year ended December 31, 1965.

Access to the foregoing documents is not in dispute.

B. Inter-departmental and inter-agency communications between the Renegotiation Board and other governmental agencies and Departments with respect to the performance by Grumman of its renegotiable business for its fiscal year ended December 31, 1965.

C. Communications between the Renegotiation Board and a customer of Grumman with respect to the performance by Grumman of its renegotiable business for its fiscal year ended December 31, 1965.

D. Intra-agency memoranda and communications consisting of advisory opinions, conclusions, recommendations, deliberations and analyses prepared by personnel and members of the Renegotiation Board in the performance of the decision-making process of the Renegotiation Board in carrying out its duties

under the Renegotiation Act of 1951, as amended, with respect to renegotiation proceedings regarding Grumman's fiscal year ended December 31, 1965.

6. With respect to Grumman's request for documents contained in Renegotiation Board files regarding the 14 other corporations, to the extent such documents are in the files of the Board, the records contain information relating to income, profits, losses or expenditure of such corporations and the source thereof and may include information relating to trade secrets, processes, operations, and style of work of the various corporations (Hartwig Affidavit, para. 4).

Respectfully submitted,

EDWIN L. WEISL, JR.
Assistant Attorney General

HARLAND F. LEATHERS
IRWIN GOLDBLOOM
Attorneys,
Department of Justice
Attorneys for Defendant

ORDER

This matter having come before the Court on plaintiff's motion for summary judgment and defendant's cross-motion for summary judgment, and the Court having considered the pleadings, affidavits and memorandum of points and authorities filed herein, having heard argument of counsel, having found there is no genuine issue of fact to be submitted to the Court and having decided that defendant is entitled to judgment as a matter of law, it is 4th day of November, 1968,

ORDERED AND ADJUDGED that:

Plaintiff's motion for summary judgment be and hereby is denied, and

Defendant's motion for summary judgment be and hereby is granted.

(Signed) HOWARD F. CORCORAN
Judge

NOTICE OF APPEAL

Notice is hereby given that Grumman Aircraft Engineering Corporation, plaintiff above named, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the order granting defendant's motion for summary judgment and denying plaintiff's motion for summary judgment entered in this action on the 4th day of November, 1968.
December 5, 1968.

GADSBY AND HANNAH

/s/ CHARLES W. COLSON
Charles W. Colson

and

/s/ TOM M. SCHAUMBERG
Tom M. Schaumberg
1700 Pennsylvania Ave., N.W.
Washington, D. C. 20006
Attorneys for Grumman
Aircraft Engineering
Corporation

GRUMMAN AIRCRAFT ENGINEERING CORPORATION,
APPELLANT

v.

THE RENEGOTIATION BOARD

No. 22635

United States Court of Appeals
District of Columbia Circuit

Argued Oct. 2, 1969

Decided March 10, 1970

• • • •

Before BAZELON, Chief Judge, and WRIGHT and ROBINSON, Circuit Judges.

BAZELON, Chief Judge.

This is an appeal from a summary judgment refusing to order production of documents under the Freedom of Information Act.[1] The issue in the case is the scope of the statutory exemption for confidential information furnished to a federal administrative agency. Appellant, an aerospace contractor, seeks an order compelling the Renegotiation Board to produce (1) the orders and opinions[2] issued during the renegotiation of the contracts of fourteen companies during the years 1962 to 1965,

[1] 5 U.S.C. § 552 (Supp. IV, 1969).

[2] The phrase "orders and opinions" is employed here to encompass the "final opinions, determinations, unilateral orders, agreements, clearance notices and letters not to proceed which appellant requested from the Board. *See* 32 C.F.R. § 1480.8 (1967); 5 U.S.C. § 551(6) (Supp. IV, 1969). In addition to the "Statement of Facts and Reasons" provided by the Board pursuant to 50 App. U.S.C. § 1215(a) (1964), the term "opinion" may also include appellant's request for the "summaries of facts and reasons" on which other "unilateral orders and agreements" are based. As the record now before us does not adequately describe these "summaries," it will be for the District Court on remand to determine whether they have the status of final agency opinions.

and (2) certain documents relating to Grumman's own renegotiation for 1965. The Board contends that the documents are exempt from disclosure because they contain trade secrets and other confidential information. The court below granted the Board's motion for summary judgment, without opinion. We conclude that the statute does not render the documents completely immune from disclosure. Accordingly, we reverse the District Court's judgment and remand for further proceedings to determine which documents (or parts thereof) are available to appellant under the Act.

I.

[1] The Board has always regarded its opinions and orders as confidential and therefore not subject to release under section 3 of the Administrative Procedure Act.[3] The authority for such a blanket denial of access to orders and opinions was removed by the Freedom of Information Act, which took effect on July 4, 1967. Government agencies are now required to make available to the public their "final opinions, including concurring and dissenting opinions, as well as orders." [4]

[2-5] The Board contends, however, that the opinions and orders in question are exempted from the Act's broad disclosure requirements because they include data submitted "in confidence" to the Board by defense contractors. The Board's argument is grounded in the statutory ex-

[3] The Board's operations are excluded from the requirements of all parts of the APA except section 3. 50 App. U.S.C. § 1221 (1964). Section 3 formerly permitted nondisclosure of orders and opinions which were "required for good cause to be held confidential." 5 U.S.C. § 1002(b) (1964). The Board imparted secrecy to all its orders and opinions by employing the presumption that, as a matter of law, they *all* came within this exception. 32 C.F.R. § 1480.8 (1967); 17 Fed. Reg. 2542 (1952).

[4] 5 U.S.C. § 552(a) (2) (A) (Supp. IV, 1969). *Cf.* 32 C.F.R. § 1480.5 (1969). The reason for requiring concurring and dissenting, as well as majority, opinions to be made public was that "five agencies—including * * * the Renegotiation Board—do not make public the minority views of their members," although the public is entitled to know the opinions of all agency members. H.R. Rep. No. 1497, 89th Cong., 2d Sess. 8 (1966).

emption for "(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential." [5] This provision was designed to prevent the unwarranted invasions of personal privacy which might be caused by the Government's discriminate release of confidential information.[6] The statutory history does not indicate, however, that Congress intended to exempt an entire document merely because it contained some confidential information.[7] On the contrary, should data which falls within Exemption (4) appear in any Board opinion or order,[8] both the Act and the Board's regula-

[5] 5 U.S.C. § 552(b) (4) (Supp. IV, 1969). *Cf.* 32 C.F.R. §1480.9 (4) (1969). The Board also cites another statutory exemption which covers matters that are "(3) specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3) (Supp. IV, 1969). Appellee argues that its opinions and orders are brought within this exemption by 18 U.S.C. § 1905 (1964), which punishes public officials who divulge "in any manner or to any extent not authorized by law" information submitted to them by any person on his trade secrets, income and the like. Unlike other statutes which specifically define the range of disclosable information, *e. g.* 26 U.S.C. § 6103 (1964), as amended (Supp. IV, 1969), section 1905 merely creates a criminal sanction for the release of "confidential information." Since this type of information is already protected from disclosure under the Act by § 552(b) (4), section 1905 should not be read to expand this exemption, especially because the Act requires that exemptions be narrowly construed. 5 U.S.C. § 552(c) (Supp. IV, 1969).

[6] S. Rep No. 813, 89th Cong., 1st Sess. 9 (1965).

[7] *Id.* at 7; H.R. Rep. No. 1497, *supra* note 4, at 8.

[8] The "deletion" provision of the Act refers to "opinions" but not to "orders," because it apparently contemplates that "orders" are merely summary statements of agencies' final adjudicative action and are accompanied by "opinions" setting forth the agencies' principles and reasoning. See Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act 18 (1967). The renegotiation process clearly does not fit this pattern, since 90% of the Board's determinations are by order without opinion. In order to achieve the statutory purpose of disclosing agency action while concealing personal identity, the Board must be allowed to delete identifying details from its orders. Moreover, this protects the Congressional determination that there be two methods of renegotiation, voluntary "agreements" (orders) and unilateral Board determinations (orders with opinions), by giving the same anonymity to all orders as is given to opinions.

tions [9] recognize that the interests of confidentiality can be protected by striking identifying details prior to releasing the document.[10] The District Court's judgment, permitting appellee to deny the public all access to its orders and opinions, must therefore be reversed and the cause remanded to allow appellant access to the orders and opinions requested after appellee has made suitable deletions.

[6] A request for the orders and opinions concerning a single contractor would clearly create a problem of confidentiality. In the present case this problem does not exist because appellant has requested orders and opinions relating to fourteen contractors, and their release en masse without identifying details will preserve anonymity. In the future, the Board can avoid the problem by deleting identifying details from each opinion or order and then making it available to public inspection as a matter of course.[11] This procedure will fulfill the statutory mandate by exposing to public scrutiny the agency's discharge of its functions while protecting the privacy of the persons involved in the disposition of individual cases.[12]

II.

In addition to the orders and opinions, appellant also requested the Board to release "the reports, correspond-

[9] 5 U.S.C. § 552(a) (2) (Supp. IV, 1969); 32 C.F.R. § 1480.5(c) (1969).

[10] The Act requires that "the justification for the deletion shall be explained fully in writing." 5 U.S.C. § 552(a) (2) (Supp. IV, 1969). *Cf.* 32 C.F.R. § 1480.5(c) (2) (1969).

[11] To preserve the anonymity of its records, the Board may, of course, refer to them by date or other code number in the index to its members' votes and opinions. 5 U.S.C. § 552(a) (2) (Supp. IV, 1969); 32 C.F.R. § 1480.5(d) (1969). A system of numerical identifications has previously been used to report on the Board's operations. See Comptroller General's Report on Coordination Between the Renegotiation Board and the Defense Department, BNA Fed. Contracts Rep. No. 232 at D-1 (July 29, 1968).

[12] *See* H.R. Rep. No. 1497, *supra* note 4, at 8; S. Rep. No. 813, *supra* note 6, at 7.

ence and data" in connection with Grumman's renegotiations for 1965. There is no suggestion that these are not "identifiable records" within the meaning of § 552 (a)(3). In fact, the Chairman of the Renegotiation Board inspected the material in question and divided it into four categories:

> A. Letters and documents exchanged by Grumman and the Board;
>
> B. Inter-departmental and inter-agency communications between the Board and other government agencies with respect to Grumman's performance on its renegotiable contracts;
>
> C. Communications between the Board and a firm holding a renegotiable contract, concerning Grumman's performance as a subcontractor; and
>
> D. Intra-agency memoranda and communications consisting of advisory opinions, conclusions, recommendations, and analyses prepared by personnel and members of the Board.[13]

The parties agreee that the documents in category (A) are available for inspection; appellant also states that it does not seek access to the advisory memoranda encompassed by category (D). Thus the parties appear in an adversary posture only as to the "performance reports" in categories (B) and (C).

[7-8] Congress intended that § 522 would make available to the general public any agency records "which would routinely be disclosed to a private party through the discovery process in litigation with the agency." [14]

[13] Appellant suggested that there might be a fifth category of documents, "investigatory or other factual reports prepared by Board employees," but appellee assured this court that any such items are included in categories (B) and (C).

[14] H.R. Rep. No. 1497, *supra* note 4, at 10. Documents are available "if a court would 'routinely' order them produced in discovery proceedings," even though the agency might oppose production. Benson v. GSA, 289 F.Supp. 590, 595 (W.D. Wash. 1968), aff'd *sub nom.* GSA v. Benson, 415 F.2d 878 (9th Cir. 1969). While adopting "discovery" criteria as a gauge for availability, the Act removed the requirement that a party show "need" for a document; information is available equally "to any person." *See* Davis, The Information Act: A Preliminary Analysis, 34 U. Chi. L. Rev. 761, 765-66 (1967).

In Boeing Airplane Co. v. Coggeshall,[15] we held that the Board's investigatory and other factual reports were subject to discovery. Hence, the documents being sought by appellant are clearly available to it under the Act unless they are exempted by subsection (b).

[9-11] The Board contends that such immunity from disclosure is provided by Exemption (4)'s protection of confidential commercial and financial information. This provision has been interpreted to encompass only information received from persons outside the Government.[16] We concur in this reading of the statute.[17] The plain language of the exemption—it applies only to "information obtained from any *person*" [18]—is reenforced by the statutory history, which indicates that the exemption was not meant to allow agencies to render documents "confidential" by passing them back and forth among themselves.[19] On the other hand, information which is confidential in the hands of one agency retains its protected character in the hands of agencies to which it is subsequently furnished.[20] On remand, the District Court will have to determine, through *in camera* inspection,[21] whether the

[15] 108 U.S. App. D.C. 106, 280 F.2d 654 (1960).

[16] Benson v. GSA, *supra* note 14, 289 F. Supp. at 594; Consumers Union of United States, Inc. v. Veterans Admin., 301 F. Supp. 796, 803 (S.D.N.Y. 1969). *Cf.* Davis, *supra* note 14, at 787-92.

[17] *Cf.* Boeing, *supra* note 15, 108 U.S. App. D.C. at 113, 280 F.2d at 661.

[18] The APA excludes government agencies from its definition of "persons." 5 U.S.C. § 551(2) (Supp. IV, 1969).

[19] S. Rep. No. 813, *supra* note 6, at 9; H.R. Rep. No. 1497, *supra* note 4, at 10.

[20] For example, the Board is empowered to inspect income tax returns, and its regulations require that data derived from that source not be revealed. 32 C.F.R. § 1480.2(c) (1969).

[21] *See* Ackerly v. Ley, 137 U.S. App. D.C. 133, 420 F.2d 1336 (1969); GSA v. Benson, *supra* note 14.

inter-departmental communications involved in this case come within this narrow category.[22]

[12] This analysis does not apply, however, to the reports submitted by the prime contractor on Grumman's performance, since that material originated outside the Government. After examining those documents, the District Court must decide whether they contain commercial or financial information which the contractor would not reveal to the public and therefore are exempt from disclosure or are subject to release only after appropriate deletions have been made.

Reversed and remanded.

[22] The Board initially also relied on 5 U.S.C. § 552(b) (5) (Supp. IV, 1969) which protects agencies' internal policy memoranda, but it has since abandoned that contention.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 1595-68

GRUMMAN AIRCRAFT ENGINEERING CORPORATION,
PLAINTIFF

v.

THE RENEGOTIATION BOARD, DEFENDANT

MOTION FOR SUMMARY JUDGMENT

Defendant, The Renegotiation Board, by its undersigned attorneys, respectfully moves for summary judgment pursuant to Rule 56(b) F.R.Civ.P. on the ground that there are no genuine issues as to material facts and defendant is entitled to judgment as a matter of law.

In accordance with the Judgment and Opinion of the Court of Appeals in this cause entered on March 10, 1970, defendant seeks a judgment determining that:

1. The documents in the files of The Renegotiation Board relating to the performance by the plaintiff of its Government contracts are not public documents and therefore are exempt from disclosure under 5 U.S.C. 552(b)(3), (4); and

2. The "Summary of Facts and Reasons" relating to one of the fourteen corporations as to which plaintiff seeks documents reflecting Renegotiation Board action is not a "final opinion" within the meaning of 5 U.S.C. 552(a)(2).

In support of this motion, the Court is respectfully referred to:

(A) The Affidavit of Vernon James Dwyer, Deputy Director Procurement Policy, Office of the Secretary of Defense; and

(B) The Affidavit of George Joseph Vecchietti, Deputy Assistant Administrator for Industry Affairs, National Aeronautics and Space Administration; and

(C) A group of documents submitted herewith to the Court only under seal for *in camera* examination. A description of these documents is as follows:

1. Report dated September 20, 1966, of General Dynamics Corporation, Fort Worth Division, together with Eastern Regional Renegotiation Board's (hereinafter "ERRB") letter of inquiry, dated August 17, 1966.
2. A letter dated January 15, 1968, from the Board to Naval Air Systems Command Headquarters, and the latter's reply dated January 26, 1968.
3. ERRB's letter request dated June 16, 1967, to Naval Plant Representative at Grumman's Plant and the Defense Contract Audit Agency's report dated May 7, 1967.
4. ERRB's letter dated August 17, 1966, to Naval Plant Representative at Grumman's plant and the Navy's report dated September 12, 1966.
5. Naval Air Systems Command letter dated September 23, 1966, enclosing a report on Grumman's performance.
6. ERRB's request dated August 17, 1966, to National Aeronautics and Space Administration ("NASA") and NASA's letter of September 16, 1966, enclosing (1) a report dated September 14, 1966; and (2) a report dated September 12, 1966.
7. NASA's letter dated September 29, 1966, enclosing report for Goddard Space Flight Center.
8. Naval Air Systems Command letter dated October 12, 1966, attaching report.
9. ERRB's August 17, 1966, request and Department of the Army's Performance Report dated September 28, 1966.
10. A group of Contractor Performance Evaluation Reports prepared by the Department of Defense and NASA bearing the following designations:

a. DDC-CP0024-03

b. DDC-CP0024-05

c. DDC-CP0079-01

d. DDC-CP0024-04

e. CPP-660509

f. DDC-CPP681239

g. CPT671202

h. DDC-CPP680811

(D) A copy of a Summary of Facts and Reasons issued by the Renegotiation Board with respect to a defense contractor on April 9, 1968. Also, a copy of said Summary of Facts and Reasons with proposed deletions.

(E) An Affidavit of Lawrence E. Hartwig, Chairman of The Renegotiation Board.

In further support of this Motion for Summary Judgment the Court is respectfully referred to the Memorandum of Points and Authorities filed herewith.

Respectfully submitted,

WILLIAM D. RUCKELSHAUS
Assistant Attorney General

HARLAND F. LEATHERS

IRWIN GOLDBLOOM
Attorneys, Department of Justice

Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1595-68

GRUMMAN AIRCRAFT ENGINEERING CORPORATION,
PLAINTIFF

v.

THE RENEGOTIATION BOARD, DEFENDANT

AFFIDAVIT

VERNON JAMES DWYER after first being duly sworn, deposes and says:

1. I am Vernon James Dwyer, Deputy Director Procurement Policy, Office of the Secretary of Defense.

2. Subsequent to the decision of the United States Court of Appeals for the District of Columbia Circuit in *Grumman Aircraft Engineering Corporation* v. *The Renegotiation Board*, No. 22,635, Performance Reports, Contractor Performance Evaluation Reports and other documents relating to the performance of its Government contracts by Grumman Aircraft Engineering Corporation were examined and reviewed by me on behalf of the Department of Defense. These documents, which relate to the performanc by Grumman of its government contracts subject to renegotiation during Grumman's fiscal year ended December 31, 1965, were prepared by personnel in this Department and furnished to the Renegotiation Board at the Board's request.

3. The information contained in the above-referenced documents consists almost entirely of commercial and financial data and was largely obtained from Grumman Aircraft Engineering Corporation by the Defense Department in the course of its administration of government contracts with Grumman. In addition, in one instance such reports contain information relating to a government contractor other than Grumman and such information was obtained by personnel of the Defense

Department in the course of governmental administration of that contractor's government contracts.

4. The information which is contained in the above-referenced documents relating to Grumman and another contractor is not released to the public since such information is of a type regularly received in confidence in connection with the administration of government contracts and not ordinarily made public by the contractor. Therefore, such information is confidential under the provisions of 18 U.S.C. 1905 and 5 U.S.C. 552(b)(4). Except for the information relating to a contractor other than Grumman, this Department considers the information properly releasable to Grumman and would release it to Grumman upon Grumman's request, but would not release it outside the Government to any one other than Grumman.

/s/ Vernon James Dwyer
VERNON JAMES DWYER

Subscribed and sworn to before me this 5th day of May 1970.

/s/ [Illegible]
Notary Public

My commission expires July 31, 1973.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1595-68

GRUMMAN AIRCRAFT ENGINEERING CORPORATION,
PLAINTIFF

v.

THE RENEGOTIATION BOARD, DEFENDANT

AFFIDAVIT

GEORGE JOSEPH VECCHIETTI after first being duly sworn, deposes and says:

1. I am George Joseph Vecchietti, Deputy Assistant Administrator for Industry Affairs, National Aeronautics and Space Administration.

2. Subsequent to the decision of the United States Court of Appeals for the District of Columbia Circuit in *Grumman Aircraft Engineering Corporation* v. *The Renegotiation Board*, No. 22,635, three Renegotiation Performance Reports and two Contractor Performance Evaluation Reports were examined and reviewed by me on behalf of the National Aeronautics and Space Administration. These documents, which relate to the performance by Grumman of its government contracts subject to renegotiation during Grumman's fiscal year ended December 31, 1965, were prepared by personnel in this Agency and furnished to the Renegotiation Board at the Board's request.

3. The information contained in the above-referenced documents consists almost entirely of commercial and financial data and was largely obtained from Grumman Aircraft Engineering Corporation by the National Aeronautics and Space Administration in the course of its administration of government contracts with Grumman. In addition, in one instance such reports contain information relating to government subcontractors which might

be considered to reveal information that is confidential to those subcontractors. Such information appears in Paragraph 14 (p. 6) of the Renegotiation Performance Report on Contract NAS5-814.

4. The information which is contained in the above-referenced documents relating to Grumman and other subcontractors is considered not to be releasable to the public because such information is of a type regularly received in confidence in connection with the administration of government contracts and not ordinarily made public by the contractor. Therefore, such information is considered to be confidential under the provisions of 18 U.S.C. 1905 and 5 U.S.C. 552(b)(4). Except for the information identified above relating to government subcontractors, this Agency considers the information to be properly releasable to Grumman, but does not consider it releasable outside the Government to anyone other than Grumman.

/s/ George J. Vecchietti
GEORGE J. VECCHIETTI

Subscribed and sworn to before me this 13th day of May 1970.

/s/ Margaret F. Nelson
MARGARET F. NELSON
Notary Public

My Commission Expires February 14, 1972.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1595-68

GRUMMAN AIRCRAFT ENGINEERING CORPORATION,
PLAINTIFF

v.

THE RENEGOTIATION BOARD, DEFENDANT

CITY OF WASHINGTON)
) ss
DISTRICT OF COLUMBIA)

AFFIDAVIT

LAWRENCE E. HARTWIG, being duly sworn, deposes and says:

1. I am the Chairman of The Renegotiation Board, the defendant in the above-entitled action. I make this affidavit in support of the position of the Board that Summaries of Facts and Reasons are not "final opinions" of the Board within the meaning of 5 U.S.C. 552(a)(2)(A).

2. A Summary of Facts and Reasons is to be distinguished from a Statement of Facts and Reasons. A Statement is furnished, upon request, pursuant to the requirements of Sections 105(a) of the Renegotiation Act of 1951, which provides in part as follows:

> • • • Whenever the Board makes a determination with respect to the amount of excessive profits, and such determination is made by order, it shall, at the request of the contractor or subcontractor, as the case may be, prepare and furnish such contractor or subcontractor with a statement of such determination, of the facts used as a basis therefor, and of its reason for such determination.

A Summary, on the other hand, is not a statutory document; the Act does not require the Board to furnish it. It is given, upon request, pursuant to a regulation promulgated by the Board in furtherance of the direction in the Act (sec. 105(a)) that the Board "shall endeavor to make an agreement with the contractor or subcontractor with respect to the elimination of excessive profits." The stated, and sole, purpose of the Board in providing the contractor with a Summary is "to assist the contractor in determining whether or not it will enter into an agreement" (RBR 1477.3). A Summary is available to the contractor not only at the Board level, but also at the regional board level; and a Summary issued by a regional board may be superseded by one issued by the Board after its review of the case. Thus, in a given case, there may be two separate Summaries which have different analyses and come to different conclusions. Whereas a Statement is furnished only in conjunction with a determination made by order, a Summary is available to the contractor in any case, whether the determination is subsequently embodied in an order or in an agreement.

3. If a contractor declines to enter into an agreement, the Act, in section 105(a), requires the Board to "issue and enter an order determining the amount" of excessive profits. Unless thereafter, within the time provided, the contractor files a petition with the United States Tax Court for a redetermination, such order is "final and conclusive and • • • not • • • subject to review or redetermination by any court or agency." It is only after the issuance of such an order that the contractor may request and obtain a Statement. The Statement, like the order, is final. If the contractor wishes to contest the order, because he believes that the Statement contains either an error of fact or an improper evaluation of his case, or for any other reason, his only recourse is to petition the Tax Court for a redetermination.

4. A Summary, unlike a Statement, is not a final exposition of the Board's view of the case. It is furnished, not after a final order has been issued, but in the course

of a renegotiation proceeding. It is given after the case has been fully discussed at a meeting or meetings between the contractor and Board representatives, and it may or may not include all the views expressed at such meetings. It is intended as an aid in the effort to reach agreement with the contractor. In the nature of things, since the case is still open, the Summary is subject to change; it is not a final opinion. It is issued after a determination is made, but before the determination is embodied in an order or agreement. If, during that interval, the Board discovers or the contractor points out that an error has been made, or that a material point has been overlooked, the determination is modified accordingly. A Statement, if thereafter issued in such a case, would reflect the change or correction so made and thus would necessarily differ from the Summary previously furnished.

5. Changes or corrections of the type described in the preceding paragraph have in fact occurred. For example, the Board determined excessive profits of $175,000 in the case of a contractor engaged in the development and production of advanced electronic systems and equipment. A summary was furnished to the contractor. Among other things, it stated that the contractor's performance of a major subcontract in the fiscal year under review involved little risk because of the prior experience of the contractor in making a similiar product. The contractor subsequently supplied convincing evidence that its earlier product was substantially different from that manufactured and sold in the review year. The Board thereupon undertook a reevaluation of the case and concluded that the contractor was entitled to additional credit under the statutory factors of extent of risk assumed and contribution to the defense effort. As a result, the Board reduced its determination of excessive profits to $150,000. The contractor accepted the revised determination and entered into a refund agreement.

6. In another case, involving the renegotiation of the plaintiff in this action for an earlier fiscal year, the Board determined excessive profits in the amount of $4 million. A Summary was furnished upon request of

the contractor. Thereafter, it developed that the contractor had made a price reduction in the amount of $430,550, applicable to deliveries and billings made in the year under review. The Board accordingly made a direct accounting adjustment in the same amount, which reduced the determination of excessive profits to $3,569,450. Notwithstanding this modification, the contractor declined to enter into an agreement and an order was issued.

/s/ Lawrence E. Hartwig
LAWRENCE E. HARTWIG

Subscribed and sworn to before me, a notary public in and for the District of Columbia, on this 23rd day of June, 1970.

/s/ Helen V. Allen
HELEN V. ALLEN

My Commission Expires May 14, 1974.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1595-68

GRUMMAN AIRCRAFT ENGINEERING CORPORATION,
PLAINTIFF

v.

THE RENEGOTIATION BOARD, DEFENDANT

MOTION FOR AN ORDER IN ACCORDANCE WITH THE MANDATE OF THE COURT OF APPEALS GRANTING ACCESS TO OPINIONS AND TO INVESTIGATORY OR OTHER FACTUAL REPORTS PREPARED BY BOARD EMPLOYEES

Plaintiff, Grumman Aircraft Engineering Corporation, respectfully moves this Court to enter an order granting plaintiff access to, for the purpose of inspection and copying, defendant's (a) opinions relating to fourteen named corporations for the years 1962 through 1965 and (b) investigatory or other factual reports prepared by Board employees relating to the renegotiation of plaintiff for the year 1965 not heretofore made available in accordance with the Mandate of the Court of Appeals entered on March 10, 1970.

Inasmuch as plaintiff has never been given access to defendants' files relating to plaintiff or to said fourteen corporations, plaintiff cannot specifically identify all such factual reports and opinions and therefore requests that the Court make *in camera* inspection of each such file.

Included in this motion by way of example but not by way of limitation are:

(1) Any reports of "personal observations" (Joint. App. at 36) made by Board employees on visits to plaintiff's plants.

(2) Any "Statement of Facts and Reasons" furnished pursuant to Renegotiation Board Regulation

("RBR") 1477.2 (32 CFR 1477.2) and Section 105(a) of the Renegotiation Act of 1951 (50 U.S.C. App. § 1215(a)).

(3) Any "Summary of Facts and Reasons" prepared pursuant to RBR 1477.3 (32 CFR 1477.3) when no "Statement of Facts and Reasons" was subsequently furnished.

(4) Any "report" prepared by a Regional Board pursuant to RBR 1473.2(a) (32 CFR 1473.2(a)) which results in a clearance.

(5) Any "report" prepared by a Regional Board pursuant to RBR 1475.3 (32 CFR 1475.3) which does not result in a clearance and when no "Statement of Facts and Reasons" or "Summary of Facts and Reasons" was subsequently furnished.

(6) Any "recommendation" prepared by a division of The Renegotiation Board pursuant to RBR 1472.4 (d) (32 CFR 1472.4(d)) which results in a clearance.

(7) Any "recommendation" prepared by a division of The Renegotiation Board pursuant to RBR 1472.4 (d) (32 CFR 1472.4(d)) which does not result in a clearance and when no "Statement of Facts and Reasons" or "Summary of Facts and Reasons" was subsequently furnished.

(8) Any opinion rendered in a Class B case which results in a clearance pursuant to RBR 1473.2 (b) (32 CFR 1473.2(b)).

(9) Any opinion rendered in a Class B case pursuant to RBR 1472.3 (32 CFR 1472.3) which does not result in a clearance and when no "Statement of Facts and Reasons" or "Summary of Facts and Reasons" was subsequently furnished.

(10) Any transcript, minutes or memoranda of meetings of defendant or any panel or division thereof reflecting (a) any of the above or (b) any other opinion of defendant.

In support of this Motion, the Court is respectfully referred to the Memorandum of Points and Authorities filed herewith.

Respectfully submitted,

/s/ Tom M. Schaumberg
TOM M. SCHAUMBERG

/s/ Rexford T. Brown
REXFORD T. BROWN

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1595-68

[Filed Oct. 1, 1970. Robert M. Stearns, Clerk]

GRUMMAN AIRCRAFT ENGINEERING CORPORATION, PLAINTIFF

v.

THE RENEGOTIATION BOARD, DEFENDANT

ORDER

This matter came on to be heard on plaintiff's motion for an order in accordance with the Court of Appeals mandate granting access to opinions and to investigatory or other factual reports prepared by Board employees. In aid thereof, they seek to depose Mr. Lawrence E. Hartwig, Chairman of the Renegotiation Board. The defendants seek a protective order against deposing Mr. Hartwig.

It is clear from the Court of Appeals decision, *Grumman Aircraft* v. *The Renegotiation Board*, 425 F.2d 578 (D.D.C. 1970), that the final orders and opinions of the Board are to be made public once identifying details have been deleted. It is not clear, however, what constitutes in fact a *final* order and opinion. The deposition of Chairman Hartwig should be an aid in this determination.

The Court therefore denies the Board's motion for a protective order as to Chairman Hartwig and orders the immediate taking of his deposition. Plaintiff's motion for an order in accordance with the mandate is held in abeyance pending the outcome of Chairman Hartwig's deposition.

So ordered.

/s/ [Illegible]
Judge

DATED: October 1, 1970

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GRUMMAN AIRCRAFT ENGINEERING CORPORATION,
PLAINTIFF

v.

THE RENEGOTIATION BOARD, DEFENDANT

NOTARY: Helen V. Allen (Commission expires May 14, 1974)

REPORTER: Sandra Spivak, CSR

Deposition Duces Tecum, pursuant to Notice Friday, November 6, 1970, at 11:00 A.M. at the offices of Mr. Lawrence E. Hartwig, Chairman of the Renegotiation Board Room 800, 1910 K Street, N.W., Wash., D.C.

Appearances:

For the Plaintiff:

Gadsby, & Hannah,
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
represented by:

TOM M. SCHAUMBERG, ESQ.
and
REXFORD T. BROWN, ESQ.

For the Defendant:

The Department of Justice,
represented by:

IRWIN GOLDBLOOM, ESQ.

LAWRENCE E. HARTWIG,

HAVING BEEN FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

[1] MR. SCHAUMBERG: Chairman Hartwig, I am Tom Schaumberg, Counsel for Grumman Aircraft Engineering Corporation. With me today is Rexford T. Brown, also of the firm of Gadsby and Hannah.

BY MR. SCHAUMBERG:

Q Would you please state your name and present address.

THE WITNESS:

A Lawrence E. Hartwig, 3520 39th Street, N.W., Washington, D.C.

Q What is your present place of employment?

A Chairman of the Renegotiation Board.

Q How long have you held that position, sir?

A Since April, 1961.

Q Where were you employed prior to that?

A I was a member of the Renegotiation Board.

Q And how long have you been a member of that Board?

A Since October 3, 1951.

Q Does that date indicate that you have been a member of that Board since its inception under the '51 Renegotiation [2] Act?

A Yes.

Q Would you please subscribe your duties as Chairman of the Renegotiation Board?

A Well, the duty of the Chairman of the Renegotiation Board is to preside over the Board meetings, to operate as the chief administrative officer with respect to duties which the Board entrusts to the Chairman. To see that the cases are processed expeditiously. To participate in Board deliberations with respect to cases and the decision of cases, the promulgation of regulations, bulletins and rulings, published policy statements, and to act as the spokesman for the board on Capitol Hill with respect to Board legislation and elsewhere.

Q As Chairman of the Board, are you familiar with every aspect of its operations?

A I think I am. I'd like to think I am.
Q Did you receive a notice of deposition?
A Yes, I did.
Q Did you bring with you into the hearing room the documents that were mentioned in that Notice?
A Well, the files are very voluminous and they are in another room not far from this office.
MR. SCHAUMBERG: We will go off the record.

[Whereupon, a discussion was held off the record.]

[3] MR. SCHAUMBERG: We will go back on the record.
MR. GOLDBLOOM: Would you read the last question and answer?

[The record was read by the reporter]

MR. SCHAUMBERG: Why don't you make a statement about what happened as a result of our off the record discussion, Mr. Goldbloom?
MR. GOLDBLOOM: The files have now been brought into this room, and they are here.

BY MR. SCHAUMBERG:

Q Chairman Hartwig, are those all of the files that were called for in the subpoena?

THE WITNESS:

A To the best of my belief.
MR. GOLDBLOOM: I didn't count them this morning, or look at them; but I understand that the files in connection with your subpoena were amassed. They were not here at the Board, as I understand it, at the time. Most of the files, as I understand it, or a good many of them, were out at the Los Angeles Regional Board, or the Western Regional Board, and had to be shipped here.
MR. SCHAUMBERG: We appreciate that.

BY MR. SCHAUMBERG:

Q Chairman Hartwig, before we get into the detail and contents of any of these files, would you be kind enough [4] for the purposes of this record, to give us a short description of the renegotiation process?

THE WITNESS:

A Yes. All filings over the floor—over the million-dollar floor—are made here at the headquarters. These filings then go through what we call the screening process. First they go to the Office of Accounting, to check the segregation of sales, allocation of costs, and then to the Office of Screening and Exemption. If a case does not involve excessive profits, does not pose problems, it is screened out here at headquarters. Cases which may involve excessive profits are assigned to one of the two regional boards, on a geographic basis.

The cases assigned to the regional boards for processing are typically assigned then to a renegotiator and an accountant, who comprise a team. The accountant develops information with respect to the segregation of sales, allocation of costs, the development of the figures. The renegotiator is concerned with securing information from the contractor and from the procurement agency involved, with respect to the contractor's performance and any other matters that are of interest in the evaluation of the profit.

When the—and this now involves meetings with the contractor, correspondence with the contractor.
[5] When the team has secured enough information to prepare its report, it prepares what is called a Report of Renegotiation, which consists of a Part 1(a), the accounting part, and the Part 2, which is the renegotiator's evaluation and recommendation to the Regional Board.

The recommendation of the renegotiator is then considered by the Regional Board, and at this point you have to distinguish between the Class A case and a Class B case. A Class B case is one in which the renegotiable profits are less than $800,000. In that kind of case, the Board has delegated final authority to the Regional Boards to conclude the case by a clearance or by refund agreement. In all other cases, the Regional Board's action is simply a recommendation to the statutory board because those actions must be concluded here.

Now, there is a little exception to what I just said. Now, take the refund case. If the contractor does not agree with the designation of the Regional Board, in a Class B case, the Regional Board has the authority to issue a unilateral order, which may be appealed to the Statutory Board.

All right. So, let us take a typical Class A Case because those are the cases, really, that are involved in your request. I believe they are all Class A cases. I'll describe the procedure there: the report of the renegotiation is submitted to the Regional Board. They consider the [6] recommendation made by the renegotiator. And let us assume that the renegotiator recommends to the Regional Board that the Regional Board recommend to the Statutory Board that there is a clearance. The Regional Board will then approve the recommendation of the Renegotiator, but not the report, simply the recommendation.

The report, then, with the case file comes up to headquarters for review, because the Statutory Board has reserved to itself authority to conclude those cases. When the recomemnded clearance comes to the headquarters, it is first sent to the Office of Accounting, which prepares an accounting memorandum addressed to the Office of Review, in which it comments upon the accounting, the figures, and indicates whether in its opinion the Regional Board accountant, his recommendation, has been satisfactory.

Assuming that to be so, then the Office of Review will look at the recommendation of clearance and it will assign a reviewer to the case. And the reviewer will indicate then by way of recommendation to the—to the Board whether he concurs or disagrees with the Regional Board's recommendation.

And the Director of the Office of Review will also indicate whether he agrees or disagrees with the recommendation of the Regional Board.

So that when the case then comes up to the Board on its [7] agenda, the papers have previously been circulated to the Board members for study.

All of the staff's recommendations have been circulated for study by the individual Board members. Each one will conduct his own independent study. Each one has an assistant who himself may look at the case file and look at the underlying documents for the purpose of advising that Board member.

And then, when the recommendation clearance of the Regional Board comes up on the Board agenda, the Board simply approves or disapproves the clearance. It does not adopt any of the memoranda that are before it. It does not ratify or adopt any of these staff memoranda. It simply, in the exercise of its judgment, says it is a clearance or it isn't a clearance. And there is no Board-adopted document which you could call an opinion.

Then, after the Board has acted, the clearance notice is issued to the contractor. Now, I believe that in your Class A case the notice is issued by the Regional Board. If the Regional Board is the one that recommended the clearance and the Board approved the clearance, I think it goes out from the Regional Board.

Q Would you explain to us, Chairman Hartwig, what happens in the instance of a Class A case where the—well, there are two instances, when either the Regional Board [8] makes a recommendation not of clearance but rather that there be a determination of excessive profits, or secondly, in the instance where the Statutory Board disagrees with the recommendation of the Regional Board and determines that there are excessive profits.

A Well, in a Class A case where the Regional Board recommends a refund they will attempt to secure the agreement of the contractor to that recommendation. You must understand that all of our procedure is directed toward reaching agreements with the contractors. And so, even though the Regional Board has no authority to bind the Board with respect to a refund in a Class A case, even at that level there are procedures. The Regional Board attempts to secure the agreement, even before the Statutory Board has reviewed the case.

Well, let's assume then, that the contractor agrees, the recommendation comes up here for review, and we are notified that the contractor agrees. And so the ques-

tion then is whether we will approve this recommendation, and if we do, well then of course the agreement is signed.

But the—the case is reviewed by the staff, in the same way that I described the clearance review. It goes to the Office of Accounting, the Office of Review, to make its recommendations to the Board.

Now, in the second case—

[9] Q May I interrupt you for one moment, sir. Are there instances where the Regional Board recommends a refund and where the Statutory Board thereupon reviews the case in greater detail than you just described, namely by inviting the contractor to make a presentation, etcetera, to the Board?

A Let's take the Class A case where the contractor does not agree. That's an impasse case, we call that an impasse case, and that's automatically reassigned up here. And then we—under the statute I have authority to appoint Divisions.

So I will designate a Division of the Board, usually three members, to hear the case. Prior to the time that the meeting is set up with the contractor, with the Division, the case is reviewed by the Office of Accounting and by the Office of Review and they make analyses, sometimes indicating individual differences with views expressed by staff members, all for the guidance of the Division's consideration of the case.

With that, with these analyses prepared at headquarters, and the report of renegotiation, and the case file along with material in the case file before the Division, with all that material before it, the Division then will meet with the contractor and at that meeting, as our regulations state, the contractor will be given a completely fresh look at his case.

[10] In other words, under our procedure, neither the division nor the Board is bound in any way by the determination of the Regional Board; the refund could be higher, lower, or result in a clearance. So after the meeting with the contractor, in which he presents his arguments, and the case is submitted for decision, the Division then will meet and decide the recommendation

it will make to the full Board, and it prepares a Division Report to the full Board. And let us assume, for example, that they recommend a refund. Well, it doesn't make any difference whether they recommend a refund or a clearance. The fact is that when the Board adopts the recommendation of the Division, it does just that. It does not adopt the Division report. It adopts the conclusion. It adopts the conclusion or the recommendation, but not the report.

Then, after the Board has made its determination, as you know, the contractor is notified and is given a period of time to indicate whether it agrees with the determination or wishes to have the Board issue a unilateral order.

Now, again, let me point out that this carries out the spirit of our procedure, which is that here we always try to reach an agreement. The order is the last step in a case. If, actually when the procedure falls down, that's when we issue an order. Because we always try to get an agreement.

[11] And so, the next step then is to invite the contractor, get him to agree or disagree, ask him whether he agrees or disagrees with the determination. At that point in our procedure, we have an administrative document which we call a Summary of Facts and Reasons, which the contractor may request if he wishes, in order to enable him to make up his mind whether or not he will enter into an agreement.

If then the contractor says to the Board within the time period that he cannot decide whether to agree or not without receiving a summary, he requests a summary, and we will issue it to him. After we issue the summary, which is again designed to persuade him to agree, he may—and has in some cases, as I think my affidavit points out—indicate some errors in the Board's decision.

If that is so, then the determination is corrected, and a modified determination is made. At that point, of course, he is invited again to agree or disagree. And then, at the end of the road, if he says finally he does not agree, we will issue a unilateral order, the order

that is proscribed in the Act, and which is final so far as we are concerned because it starts then the 90-day-period for appeal to the Tax Court.

After that ordered is entered, issued, the contractor is entitled to a statement of facts and reasons, upon his request. [12] In both instances you will note that in the case of the summary it is not issued except upon request of the contractor, and likewise in the case of the statement.

Q I believe you were also going to explain the instance when the Regional Board recommends clearance and the Statutory Board reviews the matter and determines that there are excessive profits.

A Well, the procedure there is essentially the same as it is in the impasse case, the ony difference being that in that case the recommendation of clearance will be considered by the Board and the Board will determine that it cannot at that point approve the recommendation, so it will reassign the case to the Statutory Board for further proceedings. And in that case, as in the impasse case, a Division will be set up, the same kind of study and analysis made by the same people who worked on the impasse cases. And then after a meeting with the contractor, if it does result in a refund, then it will have the same procedure.

Q Directing your attention first, Chairman Hartwig, to those instances where cases are screened out at the Statutory Board level: by letter of June 18, 1970, the Secretary of the Board transmitted to us certain documents which included a document entitled "Notice of Clearance without Assignment". Is that the document whereby a case which is screened out at the Statutory Board level is terminated?

[13] A That is the document which indicates that the Board will not, has decided not to proceed further with the case.

Q When you say that the Board has decided that, is that decision in fact made by the Board?

A Well, that brings up the question of relegation to the Office of Screening and Exemption.

THE WITNESS: Let us go off the record.

[Whereupon, a discussion was held off the record]

THE WITNESS: Let us go back on the record.

THE WITNESS:

A Paragraph 4(c) of General Order 2 of the Board delegates certain authority to the Office of Screening and Exemptions. It says that that Office shall have authority "without requiring approval of the Board, to cause filings to be assigned or cleared" by that Office.

And then I'll omit some language that isn't pertinent here, "but that prior Board approval shall be required for the clearance for filings in the following circumstances:

1) When the filing of a Broker-Agent shows renegotiable commission income in excess of $100,000, and renegotiable profits in excess of $50,000.

2) When the filing of any other contractor shows a renegotiable sale in excess of $10,000,000 or renegotiable profits in excess of $200,000."

[14] So, that office has authority to screen out cases under this delegation and has to submit to the Board its recommendations for cases that do not fall within that delegation.

Q May I ask you, Chairman Hartwig, what the date of promulgation of that order is?

A This is June 16, 1970. This was amended June 16, 1970. Actually the order had been in effect for a number of years prior to that. We put a new date on each of these orders every time we amend it.

Q How long has that document been available to the public?

A I think this document was—I don't.

MR. GOLDBLOOM: You don't know.

THE WITNESS: I don't know.

BY MR. SCHAUMBERG:

Q Let me rephrase the question, Chairman Hartwig. How long has that document, either in its amended form,

or any of its predecessors, which you say have been in effect for a number of years, been available to the public?

THE WITNESS:

A The reason I hesitate is that we have a large project here to implement that Freedom of Information Act and this is only one of a larger package of administrative orders and general orders that we reviewed to determine which we had to place in the library and what we didn't have [15] to place in the library. So, I am able to pinpoint the date at that time. But I do know that it was placed in the library in accordance with the effort on our part to comply with the Freedom of Information Act.

Q To your knowledge is that General Order published in the Code of Federal Regulations?

A I don't know.

Q If I have understood your testimony correctly, you have stated that unless—well, I don't want to rephrase your testimony, but there are instances when the office of Review has been delegated the authority to send to the contractor in question a Notice of Question without assignment?

A That's the Office of Screening and Exemptions.

Q Do you have in this room any files which include such a document as the Final Order of the Board?

A You mean do any of these files, is your question do any of these files contain a Clearance without Assignment Notice?

Q That is correct.

A Well, I think so.

Q And if so, would you please place before you one such file.

MR. GOLDBLOOM: We will go off the record.

[Whereupon a short recess was taken]

MR. GOLDBLOOM: We will go back on the record. [16] MR. SCHAUMBERG: Would you read back the last question and answer, please.

[The record was read by the reporter]

BY MR. SCHAUMBERG:

Q Do you now have before you, Chairman Hartwig, a file which resulted in a Notice of Clearance without Assignment?

THE WITNESS:

A Yes, I do.

Q I should like to ask you, starting with the last document in that file, to give us a description of the following document or the document which—actually, precedes that document, by telling us either the date and/or something that will identify the document.

A All right. The first document is a Notice of Clearance without Assignment.

The next is a form called "Office of Assignment, Analyst's Worksheet," which simply gives the history of this particular company in renegotiation. That is, what happened in prior years, that sort of thing, for informational purposes. And it would also contain references to, as it does in this case, wholly owned subsidiaries, which would be in a separate file.

The next is a form letter addressed to the company, requesting information pertaining to voluntary refunds and [17] price reductions.

The next is a, is the contractor's filing, with schedules and the annual report.

MR. GOLDBLOOM: Of the contractor?

THE WITNESS: Of the contractor, which the contractor probably submitted with the RB 1.

Next is a letter to the company responding to the request for an extension of time to submit data. And the letter preceding that is from the company requesting an extension of time relative to the submission of their tax data.

Can I strike that?

MR. GOLDBLOOM: You can add to it.

THE WITNESS:

A All right. I will add to it. Well actually the letter says "In view of this company's prior year's ex-

perience relative to the submission date of their immediate income tax return, and in view of the time required to consolidate certain figures," they want an extension of time to make their renegotiation file.

And the letter preceding that responds to that request.

BY MR. SCHAUMBERG:

Q For my purposes you have gone far enough into that file, unless to make the report complete you would like to read the rest of the documents in, I see no need for it.

MR. GOLDBLOOM: Have you described the entire file?

[18] THE WITNESS:

A No, there is in the cover the screening report. That form simply records in capsule form, you might say, the figures presented in the contractor's filing.

BY MR. SCHAUMBERG:

Q Does that document have sub-parts to it, so that you can describe the various parts of it, or is it just a series of numbers on a form?

THE WITNESS:

A It's a series. It sets forth the renegotiable sales and profits, the returns, and—

MR. GOLDBLOOM: Returns?

THE WITNESS:

A Return rates, return on sales, return on net worth return on capital.

It sets out information—and this is all gleaned from the contractor's filing, with respect to officers' salaries, and turnover rates, information with respect to material costs, including subcontracting. And then there is simply a form box to be checked: "Method of sales, segregation acceptable?" Box, yes. Check yes. "Method of cost allocation acceptable?" Box checked yes.

And then a box at the bottom which is checked by staff employee of the Office of Screening and Exemptions:

"Clearance recommended?" Box yes.

[19] There is also a line which indicates whether the contractor has self-applied the commercial exemption. In this particular case the contractor did not self-apply the commercial exemption.

That's it.

Q Is that the only other document, then, in addition to those that you enumerated before?

A Yes.

Q Is there a document in that file that considers the so-called statutory figures?

A Not in this file.

Q Are there instances, to your knowledge, where the statutory figures are considered by the Office of Screening and Exemptions?

A Well, I would say in response to your question that in all cases the screening people apply the statute. But to make myself clear—and this may provide an answer to your question—take the most obvious case where a contractor reports an overall loss on renegotiable business. And I believe our recent experience has been that about 20% of the filings are in that category. I ask you whether you are applying the statutory factors when you say that a contractor who has a loss has not made excessive profits. Or, who has obviously low profits.

Q Well, taking another example, however, where there [20] are indeed profits on renegotiable business rather than a loss, are there instances where the screening report will cover the statutory factors such as: character of the business, extent of the risk assumed, contribution to the defense effort, capital employed, efficiency and reasonableness of costs, and profits.

A Well, I think that when the screening people find a case which requires an extensive exploration and requires the application of the factors, this is a case which is assigned to a Regional.

Q In any effort, then, to have a complete record, I would appreciate it if you would check the screening report in three or four other files, to determine if in any one of those you see any reference to the statutory factors that I just enumerated.

A Well, my general knowledge—
MR. GOLDBLOOM: Let us go off the record.

[Whereupon, a discussion was held off the record.]

THE WITNESS:

A You won't find a discussion of the statutory factors; but I want to indicate that perhaps the reasonableness of costs and profits, which is a factor in the law, is the one that is considered, at least impliedly, when you screen out a case involving a loss or a very low profit. And so, while there may not be a discussion of the factors, the [21] factor which makes the case a candidate for clearance early in the process would be applied.

I may also wish to add to this, there is a loss-carried-forwarded provision in the statute, a 5-year loss-carried-forward. And in a case when the loss-carried-forward wipes out the contractor's profit, that kind of a case would be a candidate for clearance without assignment.

BY MR. SCHAUMBERG:

Q In those cases which are terminated with the Notice of Clearance without Assignment, is there characteristically any consideration given to comparisons of that contractor by other contractors using the same product or using the same processes?

THE WITNESS:

A This would be the exceptional case, I would say, because you're dealing in these cases with obviously non-excessive profits, and our people develop expertise through the years, and just know that in a certain industry or sub-industry, if a person has one-half of one percent profit on sales, that that is not excessive profit. There are comparisons of the company with its past renegotiation experience, because that information is available to this committee.

Q Are the rules of thumb that you just referred to, such as one-half of one percent, are those reduced to writing [22] anywhere for your employees to consider?
A No. It would be impossible to do it.

MR. SCHAUMBERG: We will take a short recess.

[Whereupon, a short recess was taken]

MR. SCHAUMBERG: We'll go back on the record.

BY MR. SCHAUMBERG:

Q Referring, Chairman Hartwig to Paragraph 4(c) of the General Order 2 which you read into the record before, that paragraph indicates that "prior Board approval shall be required for the clearance of filings when the filing shows renegotiable sales in excess of $10,000,000 or renegotiable profits in excess of $200,000." Is any such file included in the group that you have provided us with, the final document in? It is my understanding that the file that we just went through—
MR. GOLDBLOOM: Do you understand the question?

BY MR. SCHAUMBERG:

Q It is my understanding that the file we just went through, Chairman Hartwig, was not the exception that I just read to you. That was a file where the staff was authorized to issue the clearance. What I am now asking about is the case that is the exception.
MR. GOLDBLOOM: Let us go off the record.

[Whereupon, a discussion was held off the record]

MR. GOLDBLOOM: Let us go back on the record.
[23] THE WITNESS: Would you repeat the question again?

[Whereupon the record was read by the reporter]

THE WITNESS:

A Well, the case that I described was then not the exception. That was a case that was submitted to the Board for approval.

BY MR. SCHAUMBERG:

Q Just so the record is clear, so that is the exception?
A That is the exception. Well, it's—
MR. GOLDBLOOM: Why don't we define our terms, rather than talking about exception and non-exception?

THE WITNESS:

A The case I described was a case where the Office of Screening and Exemptions did not have delegated authority to screen out the contractor. In that actual case, the office submitted its recommendation to the Board and the Board approved it. So that the Clearance without Assignment in that case went out without approval.

BY MR. SCHAUMBERG:

Q And that Board approval was given on the basis of the documents that you identified earlier?

THE WITNESS:

A Yes. There is one other document which is not in this file and it simply a typewritten list of the cases which [24] are recommended for clearance by the Office of Screening and Exemptions. They will submit their list to the Board for approval or disapproval.

Q Are these then decided by the Board en masse?

A Yes. Well, one at a time, yes. I thought you meant with the Board en masse. No, the Board goes through each case on the list and decides whether it will approve the recommendation or whether the case should be assigned for further processing.

Q And is it correct, Chairman Hartwig, that all of those cases that come to the Board for approval never have—at least in the files that are the subject of this case—an analysis as such of the statutory factors? And when I say "as such" I recognize that reasonableness of cost and profits is always inherent in a decision. But other factors such as contribution to the defense effort, etcetera, are not necessarily inherent in that.

A That is right. The committee will, in capsule form, set forth some basic statistics for the information of the Board. The kind of statistics that I showed you were on the screening report, and this enables the Board then to itself, if it wishes, or an individual Board member wishes, to investigate the case file, to make his own study to decide whether it would approve the recommendation, or whether the case should be assigned for further processing.

[25] Q Does the Board keep minutes which reflect the decisions made on these—

A The Board does.

Q Are those minutes available to the public?

A No. I may say the minutes simply record that the Board approved the recommendation of the Office of Screening and Exemptions with respect to the following-named companies. There is no record discussion.

Q Turning now to the cases which resulted in a Clearance after Assignment, do you have such a file available to you.

A Yes.

MR. SCHAUMBERG: Would you, Mr. Goldbloom, make a list of each of the files that the Chairman goes through during the course of this deposition?

MR. GOLDBLOOM: I'll keep a record of the Board files which are used, from which the Chairman is testifying.

MR. SCHAUMBERG: Thank you.

MR. GOLDBLOOM: All right.

BY MR. SCHAUMBERG:

Q Would you please take that file and, starting with the last document, go through the same identification procedure that you did previously.

THE WITNESS: Let's go off the record.

[Whereupon, a discussion was held off the record]

[26] BY MR. SCHAUMBERG:

Q It will be satisfactory, Chairman Hartwig, if you would like to start with the assignment and then move forward in the renegotiation process.

THE WITNESS:

A All right. The first document in the file is a form, "Assignment, Suggestion and Notice," which accompanied the file to the Regional Board, and it makes certain comments with respect to certain points that should be explored among others.

Q On that point, Chairman Hartwig, are those points that relate directly to certain statutory factors?

A In this case the points were largely segregation of sales and allocation of costs. And it so happens that those were the initial suggestions or comments. I know from general knowledge that there are other cases where questions involving the statutory factors would be noted on the assignment sheet, but you must remember that the Region's study of the case is not confined to the suggestions made by the headquarters staff. These are simply a way of starting the region to conduct its study.

The next document, RB 1, Filing of the Contractor.

MR. GOLDBLOOM: Excuse me. What is that?

THE WITNESS:

A The RB 1, the Filing, the Contractor's Filing. [27] Some of these documents are not in chronological order. The next document is a memorandum from the Director of the Office of Accounting to the Director of the Office of Review, commenting on the account in Part 1(a).

The next is Notice from the Chairman of the Regional Board to the contractor stating that the case has been designated as a Class A case.

Next is a notice of commencement of renegotiation.

Next is a memorandum of a conference between the renegotiator and the accountant and representatives of the contractor.

Next is a document listing the major prime and subcontracts by number.

Next is a request from the contractor for an extension of time to file certain information that had been requested.

Next is a document notifying the contractor that due to the retirement of the renegotiator assigned to the case that it had been reassigned to another renegotiator.

Then there is a letter from the contractor to the Procurement Agency with respect to certain prices that were bid on certain contracts.

And then—this seems to be a copy of an agreement between a procurement agency and the contractor with

respect to treatment of independent research and development.

And then there is a letter enclosing, transmitting that [28] agreement to the regional board.

Then there is a document submitting the information to the Regional Board which had been requested.

MR. GOLDBLOOM: Is that from the contractor?

THE WITNESS:

A From the contractor.

The next is a summary of the contractor's financial data, which is called a "Schedule A." And then a letter transmitting to the contractor the Part 1(a) which is the account report, including the Schedule A.

Next is the minutes of a telephone conversation between the accountant and a representative of the contractor, requesting more information with respect to an accounting point.

Next is a letter from the contractor to the accountant, submitting some additional accounting information.

Then there is the Report of Renegotiation.

Then there is a letter from the Regional Board to the contractor stating that the "Regional Board had made a final recommendation "that you have not realized excessive profits and that the Statutory Board has been notified."

It states further that the "Statutory Board will decide whether or not it is in accord with the recommendation."

BY MR. SCHAUMBERG:

Q Excuse me, Chairman Hartwig, did you testify earlier [29] that in a Class A case such approval had to be obtained in every instance by the Statutory Board?

THE WITNESS:

A Yes. The next is a form prepared by an accountant, setting forth the figures involved in this case. This is prepared by the Regional Accountant.

Next is a form transmitting the documents to the headquarters.

Q Which documents are those, sir?

A The complete case file.

Then there is a memorandum from the Office of Accounting directed to the Office of Review, commenting on the accounting in the Part 1(a).

The next is a document entitled "Review of the Determination, Office of Review," setting forth the sales and profits, and accompanying that document is a memorandum of a reviewer in the Office of Review, which discusses the case and concludes, "In view of the above, it is recommended that the contractor be given a clearance notice."

Q Turning back to—

A Excuse me. Now, over in the other part of the file there is a folder containing performance reports, and the report of the public accounting firm with respect to this company, and copies of the company's income tax returns. Also what appears to be an accountant's work papers.

[30] Q Does that constitute the entire file of that contractor for the entire renegotiable year?

A Well, there is an assignment file, I believe, that would contain the material I described with respect to the other case, because this case went through the screening process but didn't end at headquarters. It was assigned to the region. The assignment file would simply—

MR. SCHAUMBERG: Let us go off the record.

[Whereupon discussion was held off the record]

BY MR. SCHAUMBERG:

Q If you would, turn back to the report to renegotiation which you referred to. Does that document contain sub-parts or headings, or anything to differentiate one portion of it from another?

THE WITNESS:

A Well, the first part, the caption is "Report of renegotiation," the first part is "Part 1(a), Accounting Section," and "Part 2,"—

Q Excuse me, before you go into part 2, it is called part 1(a) because there is a Part 1(b), is this right?

A There was a Part 1(b) which at one time was used to summarize a contractor's representations, or where the report from the contractor was short, perhaps the entire report would be incorporated in the 1(b). But that practice has largely been abandoned because those who are reviewing [31] those reports will go through the entire statement of the contractor rather than rely on a summary of the contractor's statement. So, while the 1(b) for all practical purposes no longer exists, we still call the accounting section 1(a).

Q Thank you. Moving on to Part 2, does that have any sub headings?

A No. Part 2, well, there are sub headings under the factors.

Q Could you go through that for us, item by item?

A Well, there is Subheading A, Sources of Information. B, Application of Statutory Factors. One under that. Character of Business. Two under that, Capital Employed. Three, extent of risk assumed. Fourth, contribution to the defense effort. Five, efficiency. Six, reasonableness of costs and profits.

A under that, costs.

B under that, pricing.

C, profits. And then a large C, capital C, entitled "Special Matters", and then a capital D, Conclusion and Recommendation.

Q Could you describe generally what is included in the heading "Sources of Information," without revealing anything that should not be on the public record, but just what types generally of information are contained there?

A For example, it states that performance data were [32] filed and indicates the file period. This is for the information of the reviewer. The report refers him to the case file, to examine the performance data.

Q Is that all that is referred to?

A Well, in this particular case the contractor did not submit a statement of factors. It makes that statement. And the third point is that there was no visit to the contractors of this plant. That's all there is.

Q Is there, under Heading B, Application of the Statutory Factors, a place where the contractor is compared with other contractors, producing the same or similar product or using the same or similar processes?

A I don't see any comparison with respect to the factors here.

Q Could you tell us again generally what kind of information is contained under Heading C, Special Matters?

A This referred to a claim which the contractor has outstanding against someone.

Q Is that all that is contained?

A That's all.

Q And what is contained in Section D?

A Well, this is the conclusion and recommendation, and the final language is "It is accordingly requested that the Eastern Regional Board recommend to the Renegotiation Board that a clearance notice be issued to the contractor for [33] the year in question."

Q Have we now gone completely through the report of renegotiation?

A We have.

Q Would you then turn to the memorandum by the reviewer in the Office of Review to which you referred.

A All right.

Q Could you describe that document in some detail? Does it have any headings, for instance?

A Well, it has headings "Business, Costs and Expenses"—

Q Excuse me. Do those have Roman Numerals or letters or anything?

A No, they are just headings without Roman Numerals.

Q Could you give those to me then, please?

A Business, costs, and expenses, selling and advertising, general and administrative expenses, government assistance, net worth, performance information, statutory factors, recommendation.

Q How many pages are in that document?

A Oh, a little more than two pages, single-spaced.

Q Going to each one of those headings now, could you tell us just generally again what is contained under each one of them?

A Well, under Business, there is a description of [34] the—a short description of the product involved. Under the Costs and Expenses, selling and advertising, general administration, there is a short discussion of the pertinent statistics. Under Government assistance, there are statistics with respect to type and amount of Government assistance. Net Worth sets out again the figure, noting what the figure was in the prior year. Under Performance Information, there is a general summary of the comments of the various Government agencies on the contractor's performance.

And then under the Statutory Factors there is a very short characterization of the—well, actually, under the Statutory Factors, this is simply a summary of the Part 2, it sets forth here the summary of the Part 2 and indicates that he is in agreement with the Renegotiator's summation of the factors. And then the recommendation concludes: "In view of the above it is recommended that the contractor be given a clearance notice."

Q When you went through that file I did not hear you indicate at which point the Board gave its approval to the recommendation.

A Well, that would be in another file. This report of the Office of Review, the comments of the Office of Accounting, the Report of Renegotiation, would all be presented to the Board for consideration at a Board meeting.

And the case would appear on the Board's agenda, and the [35] Board—I assume in this case, since a clearance was issued—the minutes would simply record the Board approved the clearance. This is the typical minute.

Q Did you say there was a separate file that contains this information?

A What information?

Q That you just went through. I believe you stated a moment ago that there was a separate file?

A No, I was simply trying to—

MR. GOLDBLOOM: No, he was explaining how—
THE WITNESS:
A —how this came before the Board.

BY MR. SCHAUMBERG:

Q Right.

THE WITNESS:

A And I was explaining that in this case as in all other Class A cases like it, typically each Board member would receive a copy of the Review of Determination, a copy of the reviewer's recommendation—if there was one. In this particular case there was one. In some cases you wouldn't even have this—and also a copy of the Report of Renegotiation. Those three documents would be presented to each Board member. Each would receive a copy for consideration at the next Board meeting. This gives the Board member, then, the time to examine any other documents in the [36] file that they wish to examine prior to the Board meeting.

But you can understand, because of the limitations, is is impossible to make five copies of a case file for Board consideration, so these documents are selected for this purpose from a case file and give the Board member a lead into the case.

Q Are there then, in fact, five copies made of these documents that are given to each Board member?

A I'm afraid to say this, but I think there are more than five.

Q More than five?

A We try to keep the number down; but . . .

Q Are those files kept with the case files, those five files that contain these documents?

A No, those extra copies are retained by the Board members.

Q Doesn't—

A —and from time to time there is a housecleaning.

Q Does the Board member ordinarily bring his file to the meeting of the Board?

A He does.

Q Does the Board member ordinarily make any written comments on the file which he was given?

A [Shakes head negatively] It would be an exception.

Q Going back for a moment to what is contained in the [37] file that each Board member receives, you stated that he obtains a copy of the report of renegotiation, and then you said that he also receives two other documents. Could you tell me again what those two other documents are?

A Well, the report of the Office of Accounting and the report of the Office of Review. Those are the two offices which review the case.

Q This is a little bit unclear to me: I believe you stated the first time that one document, you called it "The reviewer's recommendation," which you said is not given in every instance but was in this instance—

A He gives his recommendation, but he sometimes does not file a memorandum.

Q In the file that we just went through there was indeed such a memorandum.

A There was a memorandum. May I also clarify the record here. The Review of Determination is a form which has at the bottom a provision for indicating concurrence or disagreement by the Office of Review, and there is a box in which the reviewer can check if he concurs or disagrees, and there is a box in which the Director of the Office can check whether he concurs or disagrees.

Now, in this particular instance, in this case, the reviewer concurred in the recommendation of the negotiator of the Regional Board, and filed a short memorandum which is, [38] in effect, a part of this document which you call "Review of Determination." The Acting Director of the Office of Review also indicated concurrence in the box after the Director's name. There are instances where the reviewer and the Director will disagree and the disagreement comes before th Board. It is indicated in this manner. And where there is a disagreement which might, as in this case for example, if the Acting Director disagreed with the memorandum of the

reviewer, he may have also filed a memorandum indicating his disagreement with respect to some point.

Q That did not happen in this case?

A That did not happen in this case.

Q What then happens when the Board members get together after having read their respective files?

A Well, they come to the Board meeting and vote on the recommendation.

Q And on what would you say their decision is based?

A Well, it certainly isn't about to be based, ever, on any opinion finally expressed in any one of these documents. Many times a Board member will agree to a clearance, in this case for none of the reasons stated in the staff document. He may have his own reasons. His own assistants may have checked out some point that was bothering him, that he didn't even discuss with his colleagues. But the important thing is the informality of our procedure, whereby we [39] all agree that we agree on the results.

Q Excuse me. I didn't hear that.

A I say, when we agree, we agree on the result. We do not ratify or approve any one of these reports.

Q You are suggesting that the result can be separated from the reasons?

A I am not only suggesting it, I am saying it. Just as a practical matter, this is the only way the Board can do its job. You understand that it's our mandate to eliminate excessive profits where these exist. And when they don't exist it makes no sense to debate whether this particular document should be approved or some other document should be approved. We will have cases where the reviewer may disagree with the negotiator now on Part 2 out in the region. If we get the same result as the negotiator out in the region, that doesn't an actual issue between the reviewer and the negotiator on a particular point. This is unnecessary.

Q Taking the file that's now before you, you say that it is the job of the Board to determine whether there are excessive profits. And you say there is no reason to engage in a debate where there are none. How do you know there are none?

A Well, each one, each Board member, for reasons of his own, will conclude in the case that the profits are not [40] excessive. But the views of one Board member may not coincide with the views of another Board member. That is, they may both agree on the result, but they may not necessarily agree on the evaluation of one particular factor or another.

Q Is there any document which states the reasons why the Board approves the clearance recommended by the Regional Board?

A There is no Board-approved document, in that instance.

Q Is there any document which shows that a Board member might have disagreed with the result?

A In some cases, a Board member may have also filed a memorandum before the Board for their information, and say that "I disagree with the clearance."

Q But there was no such separate Board memorandum member in this particular file?

A Not in this case.

Or there may be cases where the Board member simply may have orally expressed a view which is not recorded anywhere, and said, "I dissent."

Q Do your minutes reflect such dissents?

A If the Board member would file a document for the Board's file, the minutes would show the words of the Board member's document in the file, yes.

Q But would the minutes reflect that he dissented from [41] the result?

A Oh, yes.

Q Would the minutes reflect the reasons for his dissent if he gave them orally?

A No.

Q Would the minutes reflect the reasons for Board concurrence if those were given orally?

A No.

Q Do you have available to you at this time the earlier file?

A Yes.

Q Without asking you to go through that entire file, perhaps you could simply refer to the last several docu-

ments which show why that file, rather than going through the "Clearance without Assignment" procedure, resulted in assignment?

A The only document I find that sets forth the reasons for assignment is the document I discussed first in this other file, the "Assignment, Suggestion and Notice."

Q That same document is contained in the file that you are looking at right now?

A Yes, a copy of that document is in this file.

Q Is there a prior document which explains why those particular topics were suggested for review?

A I don't find any other memos on the point. Or any [42] memo for that matter.

Q Is there a screening report in that file, Chairman Hartwig?

A I don't see one here. I will have someone look for the screening report after the luncheon recess.

Q Chairman Hartwig, I am still confused on one aspect of your earlier testimony. You stated that here each Board member gets—or at least in this case got—three documents, one of which was the Report of Renegotiation, another being the Reviewer's Recommendation. Now, is that the same as the Report of the Office of Review?

A I think you can say that that is the Report of the Office of Review. But let me make this clear: the Report of the Office of Review is entitled "Review of the Determination." That's a form, which sets forth as I said before a short description, one-sentence description of the products, the name of the contractor, the fiscal year, the renegotiable sales and profits, and the non-renegotiable sales and profits of the contractor, with provision down below for the signature of the reviewer and of the Director, to indicate whether he concurs or disagrees with the Region's recommendation.

The memorandum of the reviewer technically, I suppose you would say is a part of this Review of Determination. In some cases the reviewer does not submit a memorandum.

Q And then the third document is the Report of the [43] Office of Accounting?

A That's right.

Q That the same as Part 1(a) of the Renegotiation Report?

A No, that is the report prepared by the Office of Accounting at headquarters, commenting on the Part 1(a).

Q Could we just very quickly go through that particular document. I didn't ask you about that to see what it includes.

A This particular document simply goes through the important matters in the 1(a), and indicates—in this particular instance—that the 1(a) "disclosed no exemptions which significantly affect the filings," and that "the Office of Review is in agreement with the sales, segregation and cost allocation."

Q Do you know what they mean when they say "no exceptions"?

A Well, exceptions to the accounting, treatment of—exceptions to, let's say, allocation of costs.

Q To the contractor's method of allocation, in other words?

A Yes.

MR. SCHAUMBERG: In that case, I am ready for lunch.

THE WITNESS: All right.

MR. GOLDBLOOM: Shall we reconvene back here in about [44] one hour, at 2:30?

THE WITNESS: Okay.

[Whereupon a recess was taken until 2:30 P.M.]

BY MR. SCHAUMBERG:

Q During the luncheon recess, Chairman Hartwig, were you able to locate the screening report relevant to this file?

THE WITNESS:

A Yes.

Q And what does that report consist of?

A It's approximately the same type of report that I described in the other file. It contains the same kind of information on sales and profits on renegotiable business, non-renegotiable business, and the various ratios that I described.

But I think more specifically tied in with the matter of assignment, this report had comments on it which tie in with the "Assignment, suggestion and notice" Report which I described earlier. The comments are:

1) Referring to the column entitled "Other": ———, includes facilities in X dollars," and Note 2 states that the sales in that column are subject to price redetermination. And then there is simply the notation "Assignment suggested."

At the bottom there appears a notation "Assigned for accounting reasons." Those accounting reasons are stated [45] in that "Assignment, suggestion and notice sheet" that I described.

MR. SCHAUMBERG: Okay. In an off-the-record discussion we have agreed to call the file to which you are presently referring as "File 2," "File 1" having been the first file which you identified as being a file relating to Clearance without Assignment.

Now, for purposes of identifying purposes I should at this time like to identify from this file, number 2, the following three documents: I should like to identify the "Report of Renegotiation" as Exhibit 2a.

(Whereupon, the subject Report of Renegotiation was indicated to be Plaintiff's Exhibit 2a for Identification, but was not marked and was left in place in File No. 2)

MR. SCHAUMBERG: I should like to identify the Report of the Office of Review as Exhibit 2b.

(Whereupon, the Subject Report of the Office of Review was indicated to be Plaintiff's Exhibit 2b for identification, but was not marked and was left in place in File No. 2.)

MR. SCHAUMBERG: And the Memorandum of the Reviewer which is attached there too as Number 2b1.

[46] (Whereupon, the Subject Memorandum of the Reviewer was indicated to be Plaintiff's Exhibit No. 2b1 for identification, but was not marked and was left in place in File No. 2).

MR. SCHAUMBERG: And then I should like to identify the Report of the Office of Accounting as Exhibit 2c.

(Whereupon, the Subject Report of the Office of Accounting was indicated to be Plaintiff's Exhibit No. 2c for Identification, but was not marked and was left in place in File No. 2).

BY MR. SCHAUMBERG:

Q Chairman Hartwig, does—

MR. GOLDBLOOM: May I say something for the record at this point.

MR. SCHAUMBERG: Sure.

MR. GOLDBLOOM: I have in the off-the-record conversation indicated that I do not object to having the deposition transcript identify the specific documents which we are describing and about which Chairman Hartwig is testifying. However, my agreement to so identify the documents is not in any way to be construed or considered as a waiver of our objection which I now raise, or will raise if appropriate at the time, to the production of those documents as parts of the taking of this deposition.

MR. SCHAUMBERG: For the record let me state that it was clearly my understanding that the purpose of the deposition was not only to obtain the oral testimony of Chairman [47] Hartwig, but also to have avail-

able for submission in camera to the District Court those documents called for in our Motion for an Order in accordance with the mandate of the Court of Appeals, etcetera. . .

Would you please read back what I just said?

[The record was read by the reporter]

MR. SCHAUMBERG: I would contend that such submission in camera is essential in order for the District Court to make a determination whether these documents, any one or all of them, constitute opinions of the Board which should be made available in accordance with the decision of the Court of Appeals.

MR. GOLDBLOOM: All right. Responding to Counsel's statement, I consider that this deposition is being taken pursuant to the order of the Court filed October 1, 1970, by Judge Corcoran, and that nothing in that order requires the submission in camera or otherwise of documents from the Board's files, as to which the Government has objected.

BY MR. SCHAUMBERG:

Q So there is no confusion on the point, Chairman Hartwig, are these three documents just identified as Exhibits 2a through c the only documents that were made available to members of the Renegotiation Board in making their decision to approve clearance of this contractor for this year?

[48] THE WITNESS:

A In that specific case?

Q [Nods head affirmatively]

A To the best of my information and belief.

If I misunderstood your question, may I supplement that statement by saying that the entire case file was also available to each Board member for study, but the case file was not individually forwarded to the Board members unless they requested it.

Q Is there any indication on the file that the file was requested by any Board member?

A I wouldn't know.

Q Well, is there any indication on the file?

MR. GOLDBLOOM: Is there a place on that file where it would be indicated?

THE WITNESS: I find no indication.

BY MR. SCHAUMBERG:

Q Now, moving along to the Board's decision in this case, is that decision included in this file?

THE WITNESS:

A Well, the Notice of Clearance is in the file, yes.

Q Is the approval by the Board in the file?

A The approval by the Board would be in the Board minutes, and the excerpt of the Board minutes is not in the file.

[49] Q Is that excerpt contained in any other file, other than a file that just contains Board minutes?

A I am not aware of another file, other than the file containing Board minutes, unless there is a file which contains excerpts from the Board minutes, which are communicated to the Regional Boards after Board action is taken in a particular case.

Q So that this is—

A —simply to inform the Regional Boards as to what happened.

Q Then this file will be complete for purposes of this deposition, I should like to ask you to have available the appropriate minute as Exhibit 2d. Will that be possible?

A I think it would be.

MR. GOLDBLOOM: Well, it's possible. But of course, in our view any availability of a minute would have to, in effect, contain the same kind of deletions which were authorized by the Court of Appeals with respect to the issuance of the Clearance Notice, so that it would not be identifiable except for purposes of this deposition in gen-

eral terms, with a specific company, if you understand what I am saying.

MR. SCHAUMBERG: The purpose of my request is to make available to the District Court the entire dispositive aspect of this case.

THE WITNESS: I—

[50] MR. GOLDBLOOM: I understand that. But what I am saying is that our agreement to make that available would be consistent with having the right to make deletions available as well. Obviously, if the clearance notice is authorized to have deletions, any cognate minute representing that notice would also have to bear the same deletions.

(Whereupon, the Subject Minute was indicated to be Plaintiff's Exhibit No. 2d for identification, but was not marked and had not yet been located.)

BY MR. SCHAUMBERG:

Q Does this file show, Chairman Hartwig, whether there was any dissenting vote, or do you know of your own knowledge whether there was any dissenting vote as to a clearance?

A I don't think there was a dissenting vote in this case.

Q At this point, Chairman Hartwig, I would like to ask you to place before you another file, chosen from random from the 30-some files that are available to you, where there was a clearance issued after assignment. If you would be so kind, would you select out such a file from the files that are available to you. Well?

A Okay.

We will identify the file presently before you as File No. 3, and in order to expedite this somewhat, it is not necessary to identify each and every piece of correspondence [51] in the file. If you could, just go through it and tell us, you know, what the principal documents are as you see them.

A Do you want me to start at the top and work back or—

Q Why don't we do it in chronological order, as we did the last time?

A Starting with the first document, this is an RB 1, Contractor's Filing with attachments.

A request for consolidation: this happened to be a group that was entitled "consolidation" so it involved more than one corporation, quite a number of corporations.

And there appear to be quite a number of financial statements that apply to some of the affiliates of the main company.

Then there is correspondence with the company asking for more data—

MR. GOLDBLOOM: Whose is that? Excuse me, just so the record is clear, is that correspondence by the Board?

THE WITNESS: Correspondence by the Regional Board. It's then assigned to a Regional Board.

This is primarily a file which is replete with financial statements of the various companies and supplementary accounting data which was derived, and then we have the Report of Renegotiation.

[52] BY MR. SCHAUMBERG:

Q Does that document have a date on it?

A The report of renegotiation?

Q Yes.

A Yes, it gives the date that it was prepared by the renegotiator.

Q For purposes of identification, could you give us that date?

BY MR. GOLDBLOOM: All right.

THE WITNESS:

A July 25, 1969.

BY MR. SCHAUMBERG:

Q 1969?

THE WITNESS:

A Right.

Q Could you describe for us what is contained in that Report of Renegotiation, please?

A Well, like the other one I described there is the Part 1(a) which contains the accounting data, the schedule, and Part 2, again with the captions which I described in the other case.

Q Would you read those captions again, please?

A Application of the Statutory Factors—

Q Could you give me the numbers again?

A Number 1, Application of Statutory Factors. A., [53] under that, Character of Business. B., Reasonableness of Costs and Profits. C., Extent of Risk Assumed. D., Capital Employed. E., Contribution to Defense Effort. F., Efficiency. G., Special Matters.

And No. 2, Determination and Proposed ED Settlement.

Q Could you tell us the types of things that are covered under "Special Matters"?

A I don't know whether I could do that without disclosing the company involved here.

MR. GOLDBLOOM: Well, if you can't, you're not supposed to—you're not to disclose the company involved.

THE WITNESS:

A If I were to describe these special matters, you'd know what the company is.

BY MR. SCHAUMBERG:

Q Could you tell us generally what is covered under the category "Special Matters"?

A Claims by the contractor which are in litigation, claims against the contractor which are in litigation. Sometimes there is reference to general accounting reports which have been made public.

Sometimes there is an important exemption question which is in dispute. That would be a special matter because those disputes do not occur in most cases.

Oh, there might be a reference to a report of a Congres- [54] sional investigating committee involving this particular contractor.

MR. GOLDBLOOM: Excuse me, you are testifying in general terms, aren't you? You're not saying it's in this particular case?

THE WITNESS:

A No, I'm not saying this particular case.

It could be that in some instances there might be some reference here to Internal Revenue, adjustments that are still open.

BY MR. SCHAUMBERG:

Q If there are no others that come immediately to mind, what is covered under the section heading "Determination and Proposed ED Settlement"?

A Well, this is another caption which states the conclusion. It states the conclusion of the renegotiating members who prepared the report. It says, "It is proposed that the regional board recommend to the Renegotiation Board that a clearance notice be issued."

Sometimes the renegotiator will put the caption in "Conclusion." This particular individual gave it a little different caption.

But uniformly the concluding language is in the terms of the recommendation coming from the renegotiator to the Regional Board, with the Regional Board recommending action [55] by the—that the Regional Board recommend action by the Statutory Board.

MR. SCHAUMBERG: I should like to identify that document as Exhibit 3a.

(Whereupon, the subject document was indicated to be Plaintiff's Exhibit 3a for Identification, but was not marked and was left in place in File No. 3.)

BY MR. SCHAUMBERG:

Q Would you go on, please, through the file?

THE WITNESS:

A Well, again there's the notice to the contractor that the Regional Board has recommended to the Renegotiation Board that the contractor be granted a clearance. And there is the memorandum to the Office of Accounting at headquarters addressed to the Office of Review, commenting on the Part 1(a).

MR. GOLDBLOOM: Did you say that was addressed—

THE WITNESS:

A These are uniformly addressed to the Office of Review.

MR. GOLDBLOOM: Addressed from one office—

THE WITNESS: —to another.

MR. GOLDBLOOM: —to another office, all right.

THE WITNESS:

A And then there is the Review of Determination, Office of Review.

BY MR. SCHAUMBERG:

Q Could you tell us what that contains, in terms of captions and content?

THE WITNESS:

A Well, it is the same as it was in the other case. It sets forth the renegotiable sales of the contractor, profits, also the non-renegotiable sales and profits. And at the bottom of this sheet there is a box that can be checked by the reviewer, and one that can be checked by the Director of the Office of Review, indicating concurrence for this agreement with the Regional Board recommendations.

And accompanying this sheet, and a part of it, really, is a short memorandum which is not signed, but which I assume in accordance with the usual practice was prepared by the reviewer, whose signature appears on the face sheet, in which he comments on the case and concludes that it is believed that no excessive profits were realized, and a clearance is recommended.

Q Are there captions on that document?

A "Business, profit margins, Government assistance, net worth, performance information, summary and recommendations."

[Whereupon, at 3:15 P.M. the deposition was recessed, to be reconvened at a later date.]

• • • •

[56] LAWRENCE E. HARTWIG,

having been previously sworn, testified as follows:

DIRECT EXAMINATION CONTINUED

BY MR. SCHAUMBERG:

Q Chairman Hartwig, on Page 49 of the transcript of Friday's hearing, we marked as Exhibit 2d the minute constituting the Board's action with regard to this File 2. That minute was not available on Friday. Is it available today?

THE WITNESS:

A (Nods head affirmatively)

MR. GOLDBLOOM: To make it clear, this is the second case about which the Chairman was referring.

BY MR. SCHAUMBERG:

Q Could you give us the date of that minute?

THE WITNESS:

A How did we identify the Exhibit 2? What purpose would that serve? That's what I don't understand.

Q For purposes of identification, the date would be useful.

MR. GOLDBLOOM: It's Page 45.

THE WITNESS:

A Well, I have the minute. The date is February 11, 1964.

BY MR. SCHAUMBERG:

Q And what does that minute reflect, generally?

[57] THE WITNESS:

A It states that the Board approved the clearances in the subject case.

Q Does it state the grounds for the clearance?

A It does not.

Q Would you be willing to read the text of the minute?

MR. GOLDBLOOM: I would object to the reading of the text, since those minutes are not matters of public record, nor need they be.

MR. SCHAUMBERG: I believe it's very clear under the Freedom of Information Act that the final vote is to be made available.

MR. GOLDBLOOM: You haven't any question about the final vote.

MR. GOLDBLOOM: I may not have asked for it today, Mr. Goldbloom, but we are under the Freedom of Information Act, which makes it clear that's a proper subject for public scrutiny.

MR. GOLDBLOOM: I appreciate that. And if you want to ask a question about the vote to the extent that the vote is represented in the minutes, I think the Chairman can answer. But that's not the question that you asked.

BY MR. SCHAUMBERG:

Q Would you please give us the vote on that particular matter?

[58] THE WITNESS:

A The vote was unanimous.

MR. SCHAUMBERG: On Friday, Mr. Goldbloom, you stated that you do not intend any of the exhibits to this deposition to be submitted along with the deposition. I would like to suggest that perhaps a more appropriate course of action would be to have all of those exhibits placed in an envelope, not necessarily for en camera inspection, but for submission along with the deposition, so that the District Court can make a determination, with those documents available to it, whether

they should be submitted for en camera inspection, so that we do not then have to come back to the Board to receive those documents.

MR. GOLDBLOOM: Well, as I explained for the record the other day, we are keeping a record of all the documents concerning which the Chairman is testifying, and those documents are available at the Board here in Washington, and will continue to be available to the extent that they are necessary for this case. But until there is an order from the Court, and as I understand the present posture of this case there is no such order that we have to submit the documents for in camera inspection, we object to their production or submission in any form unless and until we are so ordered by the Court. And for that matter, I would like to add that I see that as of now no basis has been [59] developed in the record for the submission of any of these documents for in camera inspection or otherwise.

MR. SCHAUMBERG: I think you know, Mr. Goldbloom that under the Federal Rules of Civil Procedure, when a deposition is ordered, when a subpoena duces tecum has been signed by the Court or has been approved by the Court, particularly over a motion to quash, that the exhibits to the deposition are ordinarily furnished to the other party.

MR. GOLDBLOOM: Yes.

MR. SCHAUMBERG: In this instance we have a subject with a peculiar situation, in that your client considers each and every document in its files confidential, but I don't think that that is sufficient grounds for shielding the Court from its right to look at these documents, to determine not only your motion for summary judgment, but also our motion for an order in accordance with the mandate.

MR. GOLDBLOOM: Responding to your statement: to begin with I should like to dispute and disagree with your gratuitous and erroneous interpretation of what the Board considers to be the availability of its documents in this case or otherwise. But secondly I also consider that this deposition is being taken pursuant to your motion for the production of documents, the hearing that was conducted before Judge Corcoran in this case, and Judge Corcoran's order authorizing the taking of the deposition. I do not consider that this [60] case is an ordinary case, at this level, under the Federal Rules of Civil Procedure, in that we are attempting to determine his compliance with the mandate of the Court of Appeals.

The Federal Rules of Civil Procedure are available to me and to you as well, and should you decide to utilize them, that is your concern. I intend to rely upon them as they are available to me here, particularly in the context of the posture of this case.

MR. SCHAUMBERG: May I please have that read back? Because I did not understand what Mr. Goldbloom's point was.

(The record was read by the reporter)

MR. SCHAUMBRG: Well, that was a very long answer. I don't understand what was gratuitous or erroneous, as you said, Mr. Goldbloom. I stated that the Board considers all of the documents that we have discussed on Friday and are discussing today—

MR. GOLDBLOOM: I don't believe—

MR. SCHAUMBERG: —confidential, and it is for that reason that I am not, during the course of this hearing, permitted even to look at any one of them, and it is for that reason that these documents must be made available to the Court, so that the Court can determine what should or should not be made available.

MR. GOLDBLOOM: We will let the Court determine what documents should be made available.

[61] MR. SCHAUMBERG: It cannot, if it does not have the documents before it.

MR. GOLDBLOOM: I think it is a bit presumptuous of you, Mr. Schaumberg, to suggest that the Court can or cannot determine. You have the burden of showing the failure of compliance with the mandate of the Court of Appeals in this case, as far as I am concerned. Unless you can do that by testimony here, we are not willing to make available any of these papers unless we are so ordered. That's the short of it.

MR. SCHAUMBERG: Are you disregarding that portion of the legislative history which states that the Court and not the agency in question will determine what should be made available?

MR. GOLDBLOOM: I am not disregarding a thing, and I really think this is quite unprofitable for us to argue. I think you ought to be taking Mr. Hartwig's deposition.

MR. SCHAUMBERG: Let the record show, as I believe it does now, that every attempt has been made to have the exhibits to this deposition submitted to the court, along with the deposition, but that Defendants in this case are unwilling to do so.

MR. GOLDBLOOM: As far as the Defendant is concerned, the purpose of this deposition is, as stated in the Court's order, allowing for the deposition to be taken. Unless and until there is a requirement by the Court that we must submit [62] documents in camera or otherwise, we decline and respectfully refuse to do so.

BY MR. SCHAUMBERG:

Q Chairman Hartwig, on Friday we had moved on to what has been characterized as File 3, and you had described the so-called Report of Renegotiation, which has been marked as Exhibit 3a. Would you turn to that document again, please.

THE WITNESS:

A All right. I have it.

Q Can you tell us, either generally or specifically, if you will, who signed that report?

MR. GOLDBLOOM: I will object to a question which requires the specific identification of a signer of the report, by name. I think the Chairman can answer the type of person or the type of position held by the person who signed it in the Board structure, but I do object to the specific identification of the name of any individual who signed the report.

THE WITNESS: It was signed by a Regional Board member who prepared the report.

BY MR. SCHAUMBERG:

Q That is one of the five members of the Regional Board?

THE WITNESS:

A Yes. In this case he acted as a renegotiator. [63] You understand that some of the Regional Board members develop cases much as a renegotiator does.

Q Was the report approved by anyone?

A It was approved by the—well, the report?

Q Yes.

A The recommendation was approved by the Regional Board, and signed by the Chairman on behalf of the Regional Board as having been approved by the Regional Board.

Q Now, in terms of time, sir, was that approval concurrent with the preparation and signing of that report by the Board member who was also the negotiator?

MR. GOLDBLOOM: I am not certain that you have laid a foundation as to when the report was prepared. I would object to it unless there is some foundation.

BY MR. SCHAUMBERG:

Q Chairman Hartwig, could you tell us the date on which the report was prepared?

THE WITNESS:

A Prepared July 25, 1969.

Q Could you tell us the date that it was approved by the Chairman of the Regional Board?

A There's no date.

Q My question earlier, then, stands: can you tell us from your knowledge whether that approval would have been concurrent with the date of preparation?

[64] A Based on my general knowledge of the operation, I would say that the approval of the recommendation of the Board member followed in time the date of the preparation of the report. It would take time for the Regional Board to review the recommendation and approval of that recommendation to be given. That time

period varies, of course, with each case, depending on how much study each Board member has to give the case file, and the problems.

Q Does the signature on there of the Chairman of the Regional Board signify that the entire Regional Board approved that report?

A It does not indicate whether five Board members were present at the time the recommendation was approved, but under our procedure a quorum would have been present, at least.

Q Well, I believe that following the procedure that we were following on Friday, you were moving forward chronologically in that file to tell us what else it contained, omitting correspondence which would merely burden this record.

MR. GOLDBLOOM: Excuse me. For the sake of accuracy I certainly don't want to burden the record, but at the same time I don't want to make it appear that the file contains certain things and obviously does not contain others. So I would suggest to the Chairman that he go through a very [65] brief characterization of some of the documents in the file, even where they are not perhaps even important, but to show the nature of the processing of the case, because I think that this is what this is all about.

MR. SCHAUMBERG: That is satisfactory to me.

THE WITNESS:

A Well, the last document described in the file, I believe, was the Review of Determination of the Office of Review. Following that, the next document is the memorandum from the Office of Review to the Board. After that, a Notice of Clearance after Assignment issued by the Regional Board, and a letter to the contractor enclosing that Clearance Notice.

The file also contains performance reports. Then, in a separate package but also a part of the file, is the contractor's statement under the statutory factors—

MR. GOLDBLOOM: What does that mean? I am not sure I understand.

THE WITNESS:

A A contractor is invited by the Board to submit a statement of his on his own behalf with respect to the various statutory factors, such as character of his business, contribution to the defense effort, reasonableness of costs and profits, risk, capital factors, efficiency.

Then there are what appear to be accountant's work [66] papers, an annual report of the corporation, financial statements prepared by the firm of certified public accountants.

More drafts and work papers, a Federal Tax Return with schedules, State tax returns, reports to stockholders, and finally what appears to be an analysis of the profit experience under various contracts. That concludes the file.

BY MR. SCHAUMBERG:

Q Does that include the entire file for that contractor for that year?

THE WITNESS:

A Yes, sir. Except that there is also an assignment file in this case, as in every case that's assigned to the Region. We have such an example Friday, I think. But that is a separate file which is kept here at headquarters. This is known as the case file. The assignment file is not known as the case file.

Q Did the disposition of this case require statutory Board action?

A Yes.

Q And is there anything to indicate the nature or extent or form of that action?

A Well, again, the minutes would indicate the Board action, and in this case the minutes dated November 4, 1969 the Board unanimously approved the recommendation of clearance.

[67] Q Are you reading from an excerpt of the minutes?

A Yes. I am characterizing the minutes.

Q Is that all the minutes says—

A Well, there is a further point in this case, in that the contractor had taken issue with certain accounting matters, and the Board did not decide the contentions made by the contractors because of the small amount of dollars involved in the contentions, and so notified the contractor.

Q Is there anything to indicate in that minute the documents that were available to the various members of the Board in coming to the conclusion that there were no excessive profits?

A Well, there is a reference to the Review of Determination which had been submitted, and the recommendation of the Office of Review.

Q May we go back to those two documents, please?

A All right.

Q Now, w-en you say, and I quote "the review, the determination", which document do you mean?

A That is the document which I described in detail on Friday—

Q I believe you said—

A —which I believed I described on Page 56.

Q So that is just a sheet of paper, is that correct?

A That's a sheet, and there was a memorandum which [68] accompanied it. I described that memorandum also on the same page.

MR. SCHAUMBERG: For purposes of Identification, I should like to identify the document entitled "Review of Determination" as Exhibit 3b, and I should like to identify the attachment, which is the "Recommendation of the Office of Review", as Exhibit 3b and then put (1).

(Whereupon, the subject Review of Determination was indicated to be Plaintiff's Exhibit 3b for Identification but was not marked, and was left in place in File 3.)

(Whereupon, the subject Recommendation of the Office of Review was indicated to be Plaintiff's Exhibit 3b(1) for Identification, but was not marked, and was left in place in File 3.)

MR. SCHAUMBERG:

Q Does—

THE WITNESS: Well, just a minute. Would you read that back?

(The paragraph was read by the reporter.)

THE WITNESS: I don't know that I would make that distinction between the two documents. The first document is the Review of Determination. It also has a recommendation. As I noted Friday, there are boxes which are checked by the reviewer and by the Director of the Office of Review, indicating what their recommendation is.

[69] BY MR. SCHAUMBERG:

Q Well, on Friday, Mr. Chairman, we got as far as an identification by you on Page 56 of the transcript, where you said that accompanying the sheet which we have had identified as Exhibit 3b is a short memorandum which is not signed, and you stated that that memorandum comments on the case and concludes that it is believed that no excessive profits were realized. I then asked you whether there were captions on that documents, and your last answer of the day, I believe, contained those captions.

Now, I would like to go on from there and ask you—

THE WITNESS:

A Those are correct.

Q I would like to ask you what is contained under each one of those captions, starting with Business, in a general form as on Friday.

MR. GOLDBLOOM: I am not quite sure I understand the question. If you are really asking for a general characterization of what appears in the memorandum, in the most general terms, I wouldn't object. But I don't think the Chairman should answer—and I will direct him not to answer—to any specific statements that are set forth in this internal memorandum.

MR. SCHAUMBERG: I did not ask for any specific statements, Mr. Goldbloom.

[70] THE WITNESS:

A Well, Business discussed the character of the business very briefly. Profit Margins related to some margins realized on renegotiable contracts. Government Assistance set forth some figures. Net Worth set forth some computations. Performance Information, a brief reference to some of the performance data, and the final paragraph is a summary and recommendation. I believe I quoted from that, didn't I?

BY MR. SCHAUMBERG:

Q I believe you did.

THE WITNESS:

A Yes.

Q What is the length of that document?

A This is less than two pages, single-spaced.

Q Is there any reference on that document to the sosumed, Contribution to the Defense Effort, Capital Em-

A I think the captions refer you to the statutory factors.

Q I mean such factors such as Expense of Risk Assumged, Contribution to the Defense Effort, Capital Employed, Efficiency, and Reasonableness of Costs and Profits.

A Well, this memorandum does not purport to be a complete discussion of all of the statutory factors in this case.

Q Does it make reference to any other document?

[71] A No. Excuse me, please strike that. Well, it makes reference to the contractor's representations, which I take it are contained in the statement under the Factors. It makes reference to the performance report, which was issued by a procurement agency, and refers also to some other procurement information, which I assume was documented and is in the file somewhere.

Q Does it make reference to either Part 1a or Part 2 of the report of renegotiation? I believe in the file we went over Friday, File 2, there was such a reference. I was wondering if there was in this file.

MR. GOLDBLOOM: I object to that question. I think that's getting pretty specific. I think you've asked this witness, and I've allowed him to go on, to make a general statement about what is in the memorandum. But I think it is improper to question specifically about whether there are specific references to this memorandum or that memorandum contained in that specific document, about which he was referring. I think the witness has very clearly characterized the document for what it is, which is what I intended him to do. To go beyond that, I think is objectionable.

MR. SCHAUMBERG: While your objection is noted, Mr. Goldbloom, I think we are doing no more than piling generality on generality, because I have no idea of the content of any document to which we are referring. So if I ask you [72] if one document is referred to in another, I don't think you could say I'm getting specific.

MR. GOLDBLOOM: Well, I am stating, and I have said, that this witness is entitled to characterize these documents in general terms for what they are. These are, as we have made clear, in our papers, internal memoranda relating to the operations of the Renegotiation Board. These documents are in no way discoverable and they are subject to exemptions under the Freedom of Information Act. You are trying to characterize them or to have them deemed to be, certain types of documents which they are not. But we do not have to allow an examination of these documents by this witness in specific detail. I think you can get at the information you are seeking by asking questions about them, but I don't think that this witness need characterize them specifically.

BY MR. SCHAUMBERG:

Q I will ask the question once more, Chairman Hartwig: is there a reference in that document to the Report of Renegotiation?

MR. GOLDBLOOM: I object to that.

I would also show, for the record, that this witness has not as of now testified in any manner, shape or form

that the Renegotiation Board has adopted, made part of its statement, anything that is in that document. As far as the record shows now, it is simply an internal memorandum contain- [73] ing an analysis and commentary by a Board employee, and unless and until there is some demonstration that the Renegotiation Board has adopted that statement for any reason, there is no purpose or need to characterize it.

BY MR. SCHAUMBERG:

Q Chairman Hartwig, you were telling us, I believe that the documents which the Board had available to it when the Board approved the clearance recommended by the Regional Board were, I believe, the Review of Determination and the Recommendation of the Office of Review. Am I correct that the Report of Renegotiation was also part of the file that was made available to each individual Board member?

THE WITNESS:

A I assume that to be the case.

Q Is there any other document that was made available to each Board member?

A I assume in accordance with our ordinary practice that the Memorandum of the Office of Accounting to the Office of Review was also made available.

MR. SCHAUMBERG: I should like to mark that document as Exhibit 3c.

MR. GOLDBLOOM: Which document?

MR. SCHAUMBERG: The document to which the Chairman just referred.

MR. GOLDBLOOM: The Memorandum of the Office [74] of Accounting to the Office of Review.

(Whereupon, the Subject Memorandum was indicated to be Plaintiff's Exhibit 3c for Identification, but was not marked, and was left in place in File 3.)

MR. SCHAUMBERG: I should liked to have marked as Exhibit 3d the minute which reflects the Board's action in this case.

(Whereupon, the Subject Minute was indicated to be Plaintiff's Exhibit 3d for Identification, but was not marked, and was not yet located.)

BY MR. SCHAUMBERG:

Q Chairman Hartwig, Section 1473.2 of the Board's regulations provide, and I quote, "When a Regional Board determines in a Class A Case that the contractor has not realized excessive profits for the fiscal year under review, the Regional Board will notify the Board of the Regional Board's determination, and submit a report of the case to the Board."

Could you tell us which if any of the documents which we have described constitute that report which the Regional Board made available to the Statutory Board?

THE WITNESS:

A That's the Report of Renegotiation.

Q That is the same document, in other words, as is forwarded to the Statutory Board?

A Yes.

Q Is it at that point that it is approved by the [75] Regional Board?

MR. GOLDBLOOM: Objection. I don't think that the Chairman has stated that it is approved.

BY MR. SCHAUMBERG:

Q Referring to your earlier testimony, Chairman Hartwig, you said that the signature of the Chairman of the Regional Board on the Report of Renegotiation signified that that report was approved by the entire Regional Board.

MR. GOLDBLOOM: I don't think the Chairman—the Chairman did not so testify.

THE WITNESS:

A I didn't say that.

MR. GOLDBLOOM: Excuse me, Mr. Chairman. As I recall the Chairman's testimony, the Chairman testified —and the record of course will speak for itself—that the recommendation was approved, and not the report.

THE WITNESS:

A That is correct. And I believe I read into the record the language of the report which was signed by the Regional Board member. It concluded: "It is proposed that the Western Regional Board recommend to the Renegotiation Board that a clearance notice be issued."

Now, it was that recommendation which was approved.

BY MR. SCHAUMBERG:

Q And how is that signified?

[76] THE WITNESS:

A It is signified by the Board minute.

Q Now, excuse me. I am talking about, how it is signified that the recommendation of the renegotiator is adopted or approved or whatever the right word is, by the Regional Board for recommendation to the Statutory Board?

A There is a Regional Board minute.

Q Do you have that Regional Board minute available to you?

A Not in this particular case.

Q I would think that since we have asked for these files to be available, that that minute should be available.

A That minute is not a part of this file, you understand.

Q I believe that you testified that the signature—

A Excuse me. Hold it.

Q Excuse me. Let me finish my sentence, please.

MR. GOLDBLOOM: Wait a minute. I think the witness may want to add to his last . . .

THE WITNESS: I want to correct myself. An excerpt from the minute is in the file.

BY MR. SCHAUMBERG:

Q Could you tell us what the gist of that excerpt is?

THE WITNESS:

[77] A "The Board made a final recommendation that the contractors did not realize excessive profits. And recommended that a clearance notice be issued."

Q And did the Chairman of the Regional Board then sign the Report of Renegotiation?

A Well, his signature indicates that the recommendation of the renegotiator was approved by the Regional Board.

Q And then that becomes the Report of the Regional Board to the Statutory Board, is that correct, pursuant to regulation 1473.2?

A It is not approved by the Regional Board. It is simply a report which is submitted to headquarters. The minute speaks for itself.

Q So does the signature on the bottom of the report.

MR. GOLDBLOOM: I am not sure what that reference is, counsel. I think the Chairman has quite clearly stated what the signature represents, and I think if you are going to ask questions of the witness you should ask them and keep your references and your comments to yourself.

BY MR. SCHAUMBERG:

Q Could you tell me where in that file the comparitive analysis required by the Board's regulations under Part 1460 is made, whereby the contractor's performance is compared with the performance or the "prices, costs, and profits of other contractors engaged in the same or similar [78] products, or using the same or similar processes."—

MR. GOLDBLOOM: I object to the question because there is no showing that any such comparison is required.

BY MR. SCHAUMBERG:

Q I would like to refer you, Mr. Hartwig, to Section 1460.2(c) of the Board's regulations, which states as

follows, and I quote: "In evaluating the contractor's performance, a comparison"—and now I would like to underline the next three words—"will be made with the prices, costs, and profits of other contractors engaged in the production of the same or similar products or using the same or similar practices."

MR. GOLDBLOOM: Do you have a question?

MR. SCHAUMBERG: That is the one you objected to, Mr. Goldbloom.

MR. GOLDBLOOM: I continue my objection. I raise it again. There is no showing on the basis of your question that this regulation says that certain comparisons are required. I think you have taken a statement of a regulation entirely out of context, and have not demonstrated there any requirement that the Board has promised to make a comparison or has directed that one shall be made.

BY MR. SCHAUMBERG:

Q Chairman Hartwig, is it your understanding that your regulations indicate that a comparison will be made of the [79] nature provided in the regulations?

THE WITNESS:

A Not in every case.

Q In which cases is it made, Mr. Chairman?

A When it is deemed necessary.

Q And when is that?

A —when it is feasible.

Q And when is that, sir?

A Well, we are getting into a very broad area at this point.

MR. GOLDBLOOM: I would like to object to that, to continuing this line of inquiry, unless counsel can explain to me on what basis he can demonstrate that this will show what is a final opinion or not of the Renegotiation Board. It seems to me that you are pressing the witness here concerning Board proceedings which have absolutely nothing to do with whether the Board has or has not issued an opinion in a given case.

MR. SCHAUMBERG: In response to your question, Mr. Goldbloom, the Attorney General has stated that—and I don't pretend to quote him, but in general that—in order for the public to understand what an agency is doing, it must understand the principles under which that agency is operating. Now, this member of the public at this point has available to him only the Board's regulations, and the [80] Board's regulations in Part 1460, which is called incidentally "Principles and Factors" in determining excessive profits."

Would you read that back?

(The record was read by the reporter)

MR. SCHAUMBERG: —shows that the Board engages is, and I quote, "general considerations", and in specific considerations, in determining whether there are excessive profits.

Now, under the heading 1460.2, Specific Considerations, the paragraph concerning the comparisons is contained. Now, I think it is very much to the point if the public is to have some understanding of how the Board operates, to know when, if ever, and where the Board considers these comparisons that it explains in its regulations. And it does not state in those regulations that those comparisons are only made once in awhile. It states that they will be made. And I am trying to determine where those comparisons are made, so that the public will, as a result of the Freedom of Information Act, have some understanding of this Board's operation.

MR. GOLDBLOOM: All right. The question you raised may or may not be a very interesting question, but it is completely outside the purpose and scope of the taking of this deposition, which is mainly to find out what is a final opinion of the Renegotiation Board. Whether or not the Board has made certain comparisons, and whether it has given special consideration to various factors, which are outlined in its [81] regulations, is and may be an interesting question. I don't think it is before the Court in this case and I don't think it is encompassed within the purview of what the deposition should be designed to elicit.

This is not a deposition which examines into the entire scope of the Board's processes and how it manages its cases. You may find this an interesting endeavor, Mr. Schaumberg, but I do not. I have better things to do with my time. I think the question is, here, whether or not the Renegotiation Board has complied with the mandate of the Court of Appeals in furnishing to you the opinions, final opinions and orders, as called for by its mandate. In our view, we have done that fully in this case. And to the extent that you are finding—trying to find out that that has not been complied with, I think you are entitled to ask questions, but other questions concerning the nature of Board processes have no part in this case.

MR. SCHAUMBERG: Well, Mr. Goldbloom, before you continue this line of objection—while I know you have read it before—like to make you immediately familiar with the Court's language in ordering that this deposition take place. It says, "The deposition of Chairman Hartwig should be an aid in determining what constitutes a Board opinion."

Now, if every time I ask questions—and I find your objections today to be somewhat different and more extensive [82] and more exclusive than they were on Friday—if you object every time to questions which I think approach the question of what constitutes a Board opinion, I suppose that you are acting—or at least taking the chance of acting—contrary to the Court's order, and whatever remedies are appropriate in this case will be meted out by the court, I assume.

MR. GOLDBLOOM: I have no intention of operating in any manner contrary to the Court's order. As far as I am concerned you are entitled to find out to what extent the Board has issued a final opinion and has adopted it or made it a part of its file. To the extent that this is available to you I think that you are entitled to raise these questions. But when it comes to attempting to find out what are the contents of internal memoranda prepared by subordinate Board employees, I intend to object, and not to allow this witness to answer. What is

the contents of these memoranda is not a part of this case.

MR. SCHAUMBERG: And as I understand it, you are coupling that comment with your refusal to make these documents available to the court so that it can make that determination?

MR. GOLDBLOOM: I have explained why I do not intend to make them available, because I do not think the Court has requested them.

MR. SCHAUMBERG: So your position is that I can neither ask about them nor make them available to the Court, is that [83] right?

MR. GOLDBLOOM: You can ask any questions you like. It is your right. I intend to make my objections where they are available to me.

BY MR. SCHAUMBERG:

Q Chairman Hartwig, would you say that the two files, Nos. 2 and 3, that we have gone over Friday afternoon and this afternoon, are characteristic of the 30-some files that are the subject of this deposition with regard to the manner in which the determination is reached that the contractor should be cleared? Or is it possible that there are, if by examining you on others, other files, we will find that there are many exceptions, there are many different ways in which the Board arrives at this conclusion—

THE WITNESS: Those two files—refresh my recollection—were Class A Cases where the Regional Board recommended a clearance and the Statutory Board approved a clearance?

Q Do you know if—

A Excuse me.

Q Excuse me.

A I think so far as the procedure is concerned, these are representative. There are some clearance cases, of course, where because of the nature of the case a short form is prepared. A Part 2 is not prepared in some clearance cases in the Region.

[84] MR. GOLDBLOOM: Part 2 of what?

THE WITNESS:

A Part 2 of the Report of Renegotiation. It's a short-form clearance, where, let us say, the case was assigned to the Region to explore accounting questions, and once the accounting questions have been settled to the satisfaction of the Board, the profits are such that a lengthy evaluation of the statutory factors is not required.

BY MR. SCHAUMBERG:

Q Have you finished?

THE WITNESS:

A (nods head affirmatively)

Q Can you tell me whether in any of the Clearances after Assignment that are the subject of this deposition, if there was a recommendation by the Regional Board that there were excessive profits, but that a clearance was ordered by the Statutory Board?

THE WITNESS: Let us go off the record.

(Whereupon, a short discussion was held off the record.)

THE WITNESS: Let us go back on the record.

MR. SCHAUMBERG: Will you please, Miss Reporter, restate the last question?

(The pending question was read by the reporter.)

THE WITNESS:

A I don't know of any.

[85] BY MR. SCHAUMBERG:

Q I noticed during the pause, Chairman Hartwig, that I was furnished with one order which was titled, Notice of Clearance after Reassignment. Could you please take that file and just explain to me what the reason was for the different form of order?

THE WITNESS:

A The different form of order?

Q Different form of order in the sense that other documents were either "Clearance after Assignment" or

"Clearance without Assignment." This was the only one that said "Clearance after Reassignment." I just want to understand what that means.

THE WITNESS: Let us go off the record.

(Whereupon, a short discussion was held off the record.)

THE WITNESS: Let us go back on the record.

A I have before me a Notice of Clearance after Reassignment, and that apparently was a case where the Board reassigned the case to headquarters for some reason that is not apparent to me from the Notice, and after consideration of the case here at headquarters it was decided to issue a Notice of Clearance after Reassignment. Now, in the usual case where the Regional Board recommends a clearance in a Class A case, it is not reassigned to the headquarters Board. It is reviewed here but not reassigned here. Reassign- [86] ment may occur—speaking in general terms, now—I don't know what the effect of this case is—where the headquarters staff may want more time to explore questions.

In some cases, the recommended clearance may be questioned at headquarters to the extent that a Division is appointed, the Division then will meet with the contractor, much as it does in the refund case, to explore questions with the contractor. Then finally they will decide that a clearance is appropriate. In such a case a Notice of Clearance after Reassignment would be the document. That Notice would go forward from headquarters. The effect of the reassignment is to bring the proceedings up to headquarters.

Q In as much as this seems to be the one file that differs, at least in a limited extent, from the other two that we have gone through, I would like to designate this as File 4, and, keeping Mr. Goldbloom's comment in mind that he would like to have the substance of the file in the record in its entirety, could you quickly go through that file in chronological order and tell us what the documents are that are contained in it?

A Well, the first document is the RB1, the contractor's filing, with a letter enclosing that filing and two copies of the annual report of the contractor.

The next is notice to the contractor that the case has been classified as Class A and assigned to the Regional Board.

[87] Next, a form checking various questions which the contractor is asked to answer.

The contractor's reply.

A letter asking more questions.

Memorandum of a telephone conversation with the contractor—actually three telephone calls.

A document containing information which the contractor supplied in response to the request from the Regional Board.

An accounting memorandum from the Director of Accounting to the Regional Board, to the Chairman of that Board.

A Minute of the Regional Board, approving a certain accounting item—

Q Excuse me, is that a minute of the Regional Board?

A Yes.

A memorandum of a telephone conversation.

Another memorandum of another telephone call. Still another memorandum of a telephone conversation.

A contractor's submission of certain data.

A memorandum of a telephone conversation.

What apppears to be an accountant's work paper.

Some newspaper clippings—

MR. GOLDBLOOM: Can you hold that for a moment? I've got to make an important phone call?

(Whereupon, a very short recess was taken.)

[88] MR. GOLDBLOOM: All right.

THE WITNESS:

A Next is the report of renegotiation, which concludes: "Accordingly, the Regional Board is requested to recommend to the Renegotiation Board that a clearance notice be issued to the contractor—"

BY MR. SCHAUMBERG:

Q Could you tell us—

THE WITNESS:

A "—for the year in qeustion."

Q Could you tell us who signed that?

A It is signed by a Regional Board member, who acted as the renegotiator.

Q Is there any other signature on that?

A It is also signed by the Chairman, and the legend about his signature is, "final recommendation approved by the Regional Board."

Q Could you tell us what the headings are, or the captions are, on that final report?

A Well, the usual captions of a renegotiation report.

Q Are they the same in every instance?

A No, the organization of these reports vary. It is not stereotyped. But generally speaking there is a similarity. For example, again there is a section on Sources of Information, and then Application of Statutory Factors, Char- [89] acter of Business, Reasonableness of Costs and Profits, Extent of Risk Assumed, Contribution to the Defense Effort, Capital Employed, Efficiency of the Contractor, Determination of Excessive Profits, Proposed Settlement.

These are not stereotyped headings, but—and they vary a little bit from one region to another—but in substance they are the same.

Then, the next document is a letter notifying the contractor that the Renegotiation Board has made a final recommendation, "that you have not realized excessive profits." The same form letter that I have quoted in the other cases. It states, "The Renegotiation Board has been notified of our file recommendation in your case, and will decide whether or not it is in accord therewith. If it is in accord, then a clearance will be issued to you."

Next is a schedule of some accounting data in that case.

Next is a form transmitting the renegotiation report and a complete case file to headquarters.

Then a tax return.

Memorandum of telephone call.

Memorandum from the Office of Review at Headquarters to the Directors, Division of Accounting and the Regional Board, requesting additional accounting data.

A letter to the contractor requesting additional [90] accounting data. That letter is issued by the Director of Accounting in the Regional Board.

Next is Notice to the contractor that the case has been reassigned.

Q Is this a form notice?

A Yes.

Q Does it state the reason for the reassignment?

A It does not. It simply states that the case has been reassigned and "that the Director of the Office of Review will communicate with you with respect to further proceedings."

Now, this is a form that would be used in a case of this kind where the headquarters review discloses the need for more information.

The next is a document supplying the data requested.

MR. GOLDBLOOM: Is that from the contractor?

THE WITNESS:

A The contractor. This is simply a form, an internal document of the Office of Assignments indicating that the case was reassigned.

Next is a document entitled "Reassignment Transmittal," an internal form.

Then a memorandum of telephone conversation between the contractor and the Regional Accountant.

Memorandum of the Office of Review addressed to the —excuse me. Strike that. Memorandum of the Office of [91] Accounting, addressed to the Office of Review, discussing the Part 1(a).

Review of determination, Office of Review, with accompanying memorandum which is unsigned—no. Excuse me. The memorandum is addressed by the Reviewer to the accounting director of the Office of Review, and that memorandum accompanied the Review of Determination of the Office of Review.

Next is a memorandum reciting that the case has been reassigned and that a clearance—that the Regional Boards' clearance recommendation is appropriate.

Next is the notice of clearance after reassignment.

BY MR. SCHAUMBERG:

Q Is there also a minute which relates the Board's action?

THE WITNESS:

A Following the notice of clearance after reassignment in this file is a notice, or rather a letter, from the Secretary of the Board to the contractor, stating that "after further study the Board has concluded that additional proceedings will not be necessary and have determined that you realized no excessive profits. Accordingly there is forwarded herewith the Clearance Notice formally embodying that determination."

Now a copy of the Notice of Clearance after Reassignment.

[92] Another copy of the Secretary's letter to the contractor.

Q Do you have available the minutes of the Board's actions?

A I think so.

MR. SCHAUMBERG: Well, for purposes of identification, since this has been designated as File 4, I should like to designate the Report of Renegotiation as Exhibit 4a.

(Whereupon, the subject Report of Renegotiation was indicated to be Plaintiff's Exhibit No. 4a for Identification, but was not marked and was left in place in File No. 4.)

MR. SCHAUMBERG: I should like to designate the Review of Determination as Exhibit 4b and the accompanying memorandum as Exhibit 4b(1).

(Whereupon, the subject Review of Determination and the accompanying memorandum were indicated to be Plaintiff's Exhibit Nos. 4b and 4b(1), re-

spectively, for identification, but were not marked and were left in place in File No. 4.)

BY MR. SCHAUMBERG:

Q I did not hear you mention an accounting memorandum. Perhaps I missed that. Did you mention a memorandum from the Office of Review to the Director of the Office of Accounting of the Regional Board?

THE WITNESS:

A There also was a memorandum of the Office of Accounting to the Office of Review commenting on the Part 1a.

[93] MR. SCHAUMBERG: I should like to designate that document as Exhibit 4c.

(Whereupon, the subject memorandum was indicated to be Plaintiff's Exhibit No. 4c for Identification, but was not marked and was left in place in File No. 4.)

THE WITNESS:

A May I say that this reassignment is what we call internally a technical reassignment. This occurs when, typically, the Office of Accounting feels that some accounting data has not been fully explored in the Part 1a, and because it may necessitate further communication with the contractor or a delay in the review of the case here, the Board effects what we can call a technical reassignment. It doesn't mean that at that particular time the Board does or does not say that there is a possibility of excessive profits. It hasn't passed on that question. All it has decided is that there's a need for further information.

BY MR. SCHAUMBERG:

Q Do you have available to you now the minutes of the Board's action?

THE WITNESS:

A In this case there was a Division Report and recommendation, together with the Review of Determination prepared by the Office of Review, and the Board approved the recommendation, the Division recommendation, and determined that [94] this contractor realized no excessive profits. It directed that a clearance notice be issued.

MR. SCHAUMBERG: May I have that answer read back, please?

(The record was read by the reporter.)

MR. SCHAUMBERG: First of all, I should like to designate that minute as Exhibit 4d.

(Whereupon, the subject minute was indicated to be Plaintiff's Exhibit No. 4d for Identification, but was not marked and was left in place in File No. 4.)

BY MR. SCHAUMBERG:

Q Additionally, I should like to ask you whether that reference to a Division Report in the minute is a reference to a document that you had previously mentioned—

THE WITNESS:

A Yes.

Q —or whether this is a different document?

A There was a Division Report, and that document in the file follows the Office of—Review of Determination, Office of Review.

Q Could you tell us in general what that Division Report encompasses?

A It simply recites the reasons for reassignment, and that the accounting questions have been satisfactorily resolved, and concludes with the recommendation that the case [95] be later closed by clearance notice.

MR. SCHAUMBERG: I should like to designate that document as Exhibit 4e.

(Whereupon, the subject Division Report was indicated to be Plaintiff's Exhibit No. 4e for Identification, but was not marked, and was left in place in File No. 4.)

BY MR. SCHAUMBERG:

Q In the documents which were made available under cover of letter of June 18, 1970, there were two orders determining excessive profits.

THE WITNESS: Wait a minute. Let us go off the record.

(Whereupon, a short discussion was held off the record.)

THE WITNESS: Let us go back on the record.

BY MR. SCHAUMBERG:

Q Do you wish to add something to your description of File No. 4?

THE WITNESS:

A Yes. Also included in the file are performance reports and procurement information.

Q Thank you. As I was saying, there were two orders determining excessive profits. I should like to ask you to place before you either one of those two files.

A All right.

Q Chairman Hartwig, I would like to ask you to go through that file in chronological order, as quickly as [96] possible but including all of the relevant as well as other documents to complete the final picture of the file.

A First is the contractor's filing.

Then a document listing the major prime and subcontract sales contract numbers.

Various memoranda of telephone calls.

A request for accounting information.

Telephone call.

The contractors submit certain cost data, followed by more extensive submission of cost data, a memorandum of telephone call.

Computation of contract costs and profits.

Regional Board minute approving the allowance of a certain cost item.

Memorandum setting forth sales made by subsidiaries of the contractor.

Memoranda of telephone calls.

Memorandum director of Accounting Division, addressed to the contractor, asking for financial and accounting data.

Work papers, more memoranda of telephone calls, tax data.

Report of renegotiation.

Q Can you give us an item-by-item description, please, of the Report of Renegotiation?

MR. GOLDBLOOM: As long as it is a very general [97] description of the report, I would have no objections.

THE WITNESS: Captions?

MR. GOLDBLOOM: That's fine.

THE WITNESS:

A Well, Part 2, first caption: Sources of Information. Then, Applicable—

MR. GOLDBLOOM: Excuse me for a moment: why don't we start at Part 1?

THE WITNESS:

A All right. Part 1a is the accounting section. Name and address of contractor and their affiliation, stock ownership, affiliated related companies, business of contractor, affiliated or related companies, business of contractor—and, under Business of Contractor, character of operations: normal, commercial, business.

Principal renegotiable products and sales.

Tabulation of the number of products delivered, sales and profits before Federal Taxes. Summary of operations before renegotiation. A tally setting out current and prior renegotiation data. Description of plans, accounting methods, accounting methods for tax purposes, accounting systems, method of reporting income and costing sales by type of contract.

Notation that the contractor has filed the copy of the Federal Income Tax Returns and a copy of its annual report [98] to stockholders. The heading Segregation of Sales and Allocation of Costs and Expenses. Under that, Segregation of Sales or Buildings, Net. Allocation of Costs and Expenses. Acceptability.

Then, Cost of goods sold. Under that, a summary.

Another heading, Material and Subcontracting. Under that, Relationship to Cost of Sales. Direct Labor, Factory Overhead, Inventory. Selling and Advertising. General and Administrative Expenses. Compensation to Officers and to Others.

A discussion of pensions, retirement plans, contributions, etcetera. Other income and expense items.

Then, there is a heading Income on a Federal Tax Basis. Under that Reconciliation from book to tax basis, with a lengthy tabulation. A heading, Taxable Income. Another Heading, Latest Taxable Year Examined. State Taxes.

Then, under Capital: Assets Furnished. Amount of Customer-Furnished Material not recorded in books, Progress Payments. Return on Net Worth and Capital Employed, Price Record by Type of Contracts. Current Status of certain price-redeterminable contracts.

Research and developments. And then the Schedule A which is a statement of income separated as to renegotiable and non-renegotiable business, with the various schedules.

Comparative statement of profit or loss, per contractor's [99] books, Comparative Schedule of Factory Overhead, Comparative Schedule of G and A Expense. Comparative Balance Sheet.

MR. GOLDBLOOM: Excuse me. When you say "comparative" does it mean compared in what way?

THE WITNESS:

A By years.

MR. GOLDBLOOM: For this contract?

THE WITNESS:

A For this contract, yes.

Then, details as to sales costs and earnings, with respect to certain contracts, with many schedules, with a summary per schedule A, and tax returns.

Then some data with respect to non-renegotiable contracts.

BY MR. SCHAUMBERG:

Q Chairman Hartwig, is the accounting section of the Report of Renegotiation made available to the contractor?

THE WITNESS:

A It is.

Q Could you tell me, first of all, what is the purpose in developing this report, and then, what is the purpose of making it available to the contractor?

A The report is developed and made available to the contractor so that he may have an opportunity to take exception to any adjustments which the accountants have made.

[100] Q And why is it, why is the report prepared in the first place by the Board?

A It is necessary to prepare the report in order to establish the proper amount of renegotiable sales, the proper amount of renegotiable expenses, and renegotiable profits.

Q Would you now go on to the Part 2 of the Report of Renegotiation, and please give us those captions.

A Oh, the Report of Renegotiation? A. Sources of Information. B., Application of Statutory Factors. Under that, Character of Business, Reasonableness of Costs and Profit.

Under another subheading, Costs and another subheading Profit.

Extent of Risk Assumed, Contribution to the Defense Effort, Capital Employed, Efficiency of Contractor, Determination of Excessive Profits, Proposed Settlement.

MR. SCHAUMBERG: Let us go off the record just a second.

(Whereupon, a short discussion was held off the record.)

BY MR. SCHAUMBERG:

Q Is there any place on that Report of Negotiation where there is a comparison made with other contractors?

MR. GOLDBLOOM: I object to the question as being irrelevant and for the same reasons as I stated in objecting to a prior question of similar nature.

THE WITNESS:

[101] A (Resuming description of items in file:) The documents are a little bit out of order here, I think. The next document is a memorandum, Office of Accounting and Headquarters, addressed to the Office of Review, commenting on the Part 1a.

A letter to the contractor from the Secretary to the headquarters Board, stating that the case has been reassigned from the Regional Board to the Renegotiation Board for further study.

A memorandum of general counsel addressed to the Board discussing a legal question with respect to a certain type of contract.

A memorandum by an employee of the Office of Review addressed to the reviewer, reporting on a discussion he had with the contracting officer with respect to a certain contract.

A letter to the contractor from the Director, Division of Accounting in the Eastern Board, asking for some further contract sales and cost data.

Well, a letter from the contractor.

Memorandum of telephone call. Memorandum of Office of Accounting for the file.

Memorandum of the Office of Accounting addressed to the Office of Review, supplementing its earlier accounting review memorandum.

Review of Determination, Office Of Review, and accompany- [102] ing that a memorandum prepared by a reviewer in that office, and addressed to the Deputy Director.

BY MR. SCHAUMBERG:

Q Could you tell us what the captions on that document are?

THE WITNESS:

A Of the memorandum?

Q Yes . . .

A Business, Costs and Expenses, Government Assistance, Net Worth, Performance Information, Statutory

Factors: under that, D region, subheading This Writer, Conclusion and Recommendation.

There is also a memorandum of the Director, Office of Review, which accompanied the Review of Determination.

Q You say a memorandum, or just a covering letter?

A Memorandum.

Q Is that a substantive document in that it covers some of the factors as the memorandum itself?

A No, I think it's addressed primarily to a procedural problem.

Various memos relating to their procurement data.

A supplementary memorandum prepared by the reviewer.

Q Does that cover various factors, statutory-type factors?

A This relates primarily to obtaining the complete [103] and final results of certain contracts that had not been settled.

Another memorandum on the same subject, prepared by another employee.

A letter to the contractor from the Division Chairman, referring to certain adjustments in the figures.

Memorandum of telephone conversations.

Memorandum to the Division by the Division Chairman.

Memoranda of telephone conversations.

A letter from the contractor enclosing information.

Memorandum of conference with the contractor by staff personnel.

MR. GOLDBLOOM: Excuse me. Could you just repeat that?

(The record was repeated by the reporter.)

MR. GOLDBLOOM: Thank you.

THE WITNESS:

A A notice of points for presentation, addressed to the contractor.

Various documents relating to extension of time for the hearing with the Division.

Memorandum of the Chairman of the Division to members of the Division.

BY MR. SCHAUMBERG:

Q Could you tell us what the gist of that kind of memorandum is?

[104] MR. GOLDBLOOM: In general words. In other words, let me make myself clear: I would object if you are seeking to find out what is in that memorandum. I think the Chairman is entitled to give it a most general description and I am not going to tell him how to describe it. It is not my affair. But I think a memorandum which on its face, at least as of now, appears to be nothing more than an internal memorandum doesn't need anything more than the most general characterization.

THE WITNESS:

A Well, it discusses the request for postponement of the meeting of the Division.

A revised Schedule A.

BY MR. SCHAUMBERG:

Q Schedule A of what, sir?

THE WITNESS:

A Of Part 1a.

A report of a plant visit.

A memorandum of telephone conversation. Still another memorandum of a telephone conversation.

A memorandum from the reviewer to the Director, Office of Review, analyzing the case on the basis of new information.

MR. GOLDBLOOM: I'm sorry. You say new information?

THE WITNESS:

A New information.

[105] A letter from the contractor to the Division Chairman.

A memorandum setting forth the informal minutes of the meeting with the contractor held by the Division and prepared by an employee of the Office of Review.

BY MR. SCHAUMBERG:

Q Does that document have captions on it?

THE WITNESS:

A No captions. It's called "Minutes of Meeting." This is the report and recommendation of the division.

Q Does that document have captions?

A Memorandum to the Renegotiation Board, and it has captions: Statutory Factors. Under that, Character of Business, Extent of Risk Assumed, Efficiency, Reasonableness of Costs and Profits. Under that, Costs, Profits. Capital Employed, Contribution to the Defense Effort, Conclusion.

This report denotes the view of the majority of the Division. One member of the Division did not conclude it.

A letter to the contractor from the Secretary to the Board, informing the contractor of the Board's determination and asking the contractor to let the Board know not later than a certain date whether he wishes to enter into a bilateral agreement, or whether the Board should proceed to issue a unilateral order.

A letter from the contractor stating that it has submitted all of the evidence which it believes to be relevant, [106] and requesting a written summary of the facts and reasons upon which a decision is based, in order to assist the contractor to determine whether or not it will enter into an agreement.

Next is the summary of facts and reasons.

Q Does that have any captions.

A Yes. It starts out, I Determination.

II, Introduction.

III, Statutory Factors. Under that it has Extent of Risk Assumed, Character of Business, Efficiency, Reasonableness of Costs and Profits. Under that, Costs, Profits. Contribution to the Defense Effort. Conclusion.

Q IV is Conclusion?

A No.

Q Okay. Thank you.

A The last Roman Numeral was III, Statutory Factors. Correspondence with respect to State tax credit.

Letter from contractor to the Board stating that it can't accept the determination of excessive profits.

Q Is that "cannot"?

A Cannot. Accordingly they are unwilling to enter into an agreement for the refund.

Then there is the order determining excessive profit, and the notice of order determining excessive profit.

Correspondence with respect to tax credit.

Memorandum of the Office of Accounting, discussing cost [107] and adjustments.

The file also includes performance data.

The subcontract report, accountant's work papers, and excerpts from a Congressional Hearing.

Q Is that the entire file?

A That's the entire file, with the exception of the assignment file.

Q And I trust also with the exception of the Board's minutes?

A And the Board's minutes.

Q Do you have the Board's minutes available?

MR. GOLDBLOOM: Let me see what file that is.

BY MR. SCHAUMBERG:

Q Perhaps in this case there would be more than one Board minute and perhaps there would not. Could you tell us how many there are?

THE WITNESS:

A There is only one Board minute, and it recites that the Division Chairman presented the report and recommendation on behalf of himself and another Board member in connection with the proposed Board determination of the Regional Board.

The Board, by a majority vote, approved the Division's recommendation and determined that the contractor realized excessive profits in a certain amount. Two Board members dissented.

[108] The minute further states that a copy of the Schedule A as revised will be furnished to the contractor.

Q When you read from that, "the Chairman", does that mean the Chairman of the Division?

A Yes.

Q Or did that mean you?

A The Chairman of the Division.

Q Was there a statement of fact and reasons issued in this case?

A I don't think in this case the contractor requested a Statement of Facts and Reasons, and therefore none was issued.

Q Was there a subsequent summary prepared to the one that you just mentioned, or was there only one summary of Facts and Reasons?

A Only one Summary of Facts and Reasons, to my knowledge.

Q Was there any change made in that actual summary after it was prepared?

A You mean after it was approved and issued to the contractor?

Q Yes, sir.

A Not to my knowledge.

Q Is there a document in this file that constitutes a final exposition of the Board's case?

[109] A There is a document in the file which, in my judgement, constitutes the Board's exposition of the case, namely the Summary of Facts and Reasons. But as you know, it is our position that the Summary is not a final exposition, because the Board's determination and the Summary are subject to change.

Q Was it changed in this case, sir?

A In this case it was not changed.

Q In that case, was the summary not the final exposition of this case?

MR. GOLDBLOOM: That's a legal question. I think the Chairman has answered your question as to which documents were prepared in conjunction with the time factors involved and the determinations made; but whether or not something is a final opinion or not is a matter of law. I do not think that this witness need answer.

MR. SCHAUMBERG: I beg to differ with you, Mr. Goldbloom. The Chairman testified that this document does not constitute a final exposition of the Board's view because it is subject to change. My question was whether this document was so changed, and the Chairman said it was not.

MR. GOLDBLOOM: That is correct.

MR. SCHAUMBERG: So I am restating the question in light of his subsequent answer that this document was not changed.

THE WITNESS:

[110] A I think the Board's position is—

MR. GOLDBLOOM: Excuse me. The Board's position is made clear and the Chairman's statements are made clear. This document was not changed, as the Chairman has testified. Whether or not it is a final opinion within the meaning of the Freedom of Information Act is a legal question which this witness need not respond to.

MR. SCHAUMBERG: I did not ask him that question.

MR. GOLDBLOOM: Oh. I understood that that was the question.

MR. SCHAUMBERG: No. The question was whether that was the final exposition of the Board's view of the case, which is the language used by the Chairman in his affidavit. And I am asking, I am cross-examining the Chairman on his affidavit at this point.

BY MR. SCHAUMBERG:

Q You state in Paragraph 4 of your adffiadvit, and I quote, "A summary, unlike a statement, is not a final exposition of the Board's view of the case."

The affidavit speaks in general terms. I am now asking you about a specific summary, and asking you whether that summary constitutes the final exposition of the Board's view of this case.

THE WITNESS:

A What date is that affidavit. There are two affi-

[111] davits.

Q The date on this affidavit is—

A June 23?

Q June 23, 1970. Paragraph 4 is the one I was reading from.

A Well, I don't know whether this is responsive to your question, but: first, I don't think I can improve upon the statement made in the affidavit. And secondly, I don't think that I could testify that, had a statement of facts and reasons been requested, it would have been the same as the summary.

Q I understand that, but what I am asking you is a somewhat different question, and that is: on the record that is available to us—and that includes the entire file that you have before you—does not this summary constitute the final exposition of the Board's view of the case?

MR. GOLDBLOOM: Objection. The Chairman has testified that this was the last document that was prepared and submitted, the last action, position, or whatever the Chairman stated. You are quibbling about words here. I think that is up to the Court to make the determination, and I think, as the Chairman has stated, his affidavit speaks for itself. I think again, you are arguing a legal matter with the Chairman, and for that reason I would object.

BY MR. SCHAUMBERG.

[112] Q Chairman Hartwig, did you prepare this affidavit?

THE WITNESS:

A Yes, sir. I signed it.

MR. SCHAUMBERG: I would like to identify the following documents as Exhibits to this deposition: Exhibit 5-a is the Report of Renegotiation.

(Whereupon, the subject Report of Renegotiation was indicated to be Plaintiff's Exhibit No. 5a for Identification, but was not marked and was left in place in File 4.)

MR. SCHAUMBERG: Exhibit 5b are the comments on Part 1a of the Report of Renegotiation.

(Whereupon, the subject Comments were indicated to be Plaintiff's Exhibit No. 5b for Identification, but were not marked and were left in File 5.)

MR. SCHAUMBERG: Exhibit 5c are supplementary comments on Part 1a of the Report of Renegotiation.

(Whereupon, the subject supplementary comments were indicated to be Plaintiff's Exhibit No. 5c for Identification, but were not marked and were left in place in File 5.)

MR. SCHAUMBERG: Exhibit 5d is the memorandum by the Office of Review—and please tell me, either Mr. Goldbloom or Chairman Hartwig, if this identification is not sufficient with regard to the testimony—

MR. GOLDBLOOM: I think there is sufficient information. As far as you are concerned, the characterization that he has [113] given relates to the specific document that you have been testifying about?

THE WITNESS: (No response)

MR. SCHAUMBERG: As supplemental identification of Exhibit 5d, it has the following captions: Business, Costs and Expenses, Government Assistance, Net Worth, Performance—I believe the next word was Data—and Statutory Factors, under which there was the subheading 1, the Region, Subheading 2, This Writer.

(Whereupon, the subject memorandum was indicated to be Plaintiff's Exhibit No. 5d for Identification, but was not marked and was left in place in File 5.)

MR. SCHAUMBERG: 5e is a memorandum of the reviewer to the Director of the Office of Review.

(Whereupon the subject memorandum was indicated to be Plaintiff's Exhibit No. 5e for identification, but was not marked and was left in place in File 5.)

MR. SCHAUMBERG: 5f is the memorandum setting forth the minutes of the meeting between the contractor and a Division of the Board.

(Whereupon, the subject minute was indicated to be Plaintiff's Exhibit No. 5f for Identification, but was not marked and was left in place in File 5.)

MR. SCHAUMBERG: 5g is the Report and Recommendation of the Division to the entire Board.

(Whereupon, the subject Report and [114] Recommendation was indicated to be Plaintiff's Exhibit No. 5g for Identification, but was not marked and was left in place in File 5.)

MR. SCHAUMBERG: 5h is the letter to the contractor advising him of the Board's determination.

(Whereupon, the subject Letter was indicated to be Plaintiff's Exhibit No. 5h for Identification, but was not marked and was left in place in File 5.)

MR. SCHAUMBERG: 5i is the contractor's request for a summary of factors and reasons.

(Whereupon, the subject Request was indicated to be Plaintiff's Exhibit 5i for Identification, but was not marked and was left in place in File 5.)

MR. SCHAUMBERG: 5j is the Summary of Facts and Reasons.

(Whereupon, the subject Summary of Facts and Reasons was indicated to be Plaintiff's Exhibit 5j for Identification, but was not marked and was left in place in File 5.)

MR. SCHAUMBERG: 5k is the Order Determining Excessive Profits.

(Whereupon, the subject Order Determining Excessive Profits was indicated to be Plaintiff's Exhibit 5 k for Identification, but was not marked and was left in place in File 5.)

MR. SCHAUMBERG: And 51 is the notice of order determining excessive profits.

(Whereupon, the subject Notice of Order Determining Excessive Profits [115] was indicated to be

Plaintiff's Exhibit No. 51 for Identification, but was not marked and was left in place in File 5.)

BY MR. SCHAUMBERG:

Q Chairman Hartwig, would you place before you the other file which resulted in a unilateral order determining excessive profits?

THE WITNESS:

A Let us take a recess.

(Whereupon, at 4:20 p.m., a recess was taken until 4:30)

MR. SCHAUMBERG: I noticed that during the recess that I had neglected to mark an exhibit, the Minute of the Board's Action, which I should now like to mark at Exhibit 5m.

(Whereupon, the subject minute was indicated to be Plaintiff's Exhibit 5m for Identification, but was not marked and was left in place in File 5.)

MR. SCHAUMBERG: Perhaps it would be easier to mark these exhibits since there are going to be a number of them as we go along. So we will do it in that fashion.

THE WITNESS: Do you want me to go through this file?

BY MR. SCHAUMBERG:

Q Would you please go through the file that you have before you in the same fashion.

THE WITNESS:

A Report of Renegotiation or—excuse me—I'm getting groggy. Can you strike that?

[116] I meant to say, the RBI contractor's filing.

Q If Mr. Goldbloom has no objection, I have no objection to your going through this one a little more rapidly than the previous one.

MR. GOLDBLOOM: Yes, you can go through it, you know, as you did before, and you needn't identify the substance of these documents. My comment, when I

originally made it, was designed to indicate that there were a lot more papers in these files than the various individual reveiwer's report and analysis, and the Part 2 or whatever.

And, as you indicated from going through the last file, there certainly are many more documents than that.

THE WITNESS:

A This is a Class A Case assigned to the Regional Board.

Memoranda of telephone coversations with the contractor.

Memorandum of a meeting with the contractor, request for information.

Regional Board granted contractor's request for concurrent consideration with another company.

Memorandum of telephone conversation.

Another such memorandum. Accountant's work papers. Memorandum of conversation with the contractor. Memorandum of meeting with representatives of the contractor.

A letter from the contractor commenting on the Part [117] 1a, accounting section.

BY MR. SCHAUMBERG:

Q Excuse me. Would you repeat that?

THE WITNESS:

A A letter from the contractor, commenting on the Part 1a, the accounting section of the Report of Renegotiation which had been previously transmitted to the contractor.

Q Had you come to that report of renegotiation in your file? Because I did not hear it mentioned?

A Not yet.

Q Does that mean it is out of order?

A Not necessarily. The accounting section could be prepared before the Part 2.

Q I see.

A This is a procurement agency report.

Memorandum of telephone conversation with procurement officials. Memorandum of several telephone conversations with various representatives of the contractor.

A letter enclosing copies of a memorandum prepared by the contractor as such for consideration at a Panel Meeting of the Regional Board.

Minutes of Panel Meeting.

Q Could you tell us what that is a minute of?

A Of the meeting.

Q In general terms.

[118] A Of the meeting with the contractor at which the contractor made various representations with respect to its performance and other matters.

MR. SCHAUMBERG: I should like to designate that document as Exhibit 6a.

(Whereupon, the subject document was indicated to be Plaintiff's Exhibit No. 6a for Identification, but was not marked and was left in place in File 6.)

THE WITNESS:

A Letter to the contractor from the Regional Board informing the contractor that it had made and entered a final determination that the contractor had made excessive profits. That letter asked the contractor to notify the Regional Board by a certain date whether it was willing to enter into an agreement.

MR. SCHAUMBERG: I should like to designate that document as Exhibit 6b.

(Whereupon, the subject letter was indicated to be Plaintiff's Exhibit 6b for Identification, but was not marked and was left in place in File 6.)

THE WITNESS:

A A letter from the contractor stating that it was not agreeable to enter into an agreement, and stating that it assumed that the case would now be reassigned to the Renegotiation Board in Washington.

[119] The minutes of the Renegotiation Board reciting that on a certain date it made a final recommendation that the contractor realized excessive profits in a certain amount, noting that the contractor advised that it was willing to enter into an agreement, and recommending that the Regional Board declare an impasse.

BY MR. SCHAUMBERG:

Q Let that document be designated as Exhibit 6c.

(Whereupon, the subject minute was indicated to be Plaintiff's Exhibit 6c for Identification, but was not marked and was left in place in File 6.)

BY MR. SCHAUMBERG:

Q Chairman Hartwig, before you go on, does that document reflect the reason for the Regional Board's action?

THE WITNESS:

A It does not.

Q Is there any document in the file up to this point that designates the reason?

A The next document is the Panel recommendation to the Regional Board, commenting on the case.

MR. GOLDBLOOM: Did you say that was a panel of the Regional Board?

THE WITNESS: Yes.

And this document is the Panel report to the Board.

MR. SCHAUMBERG: I should like to designate tha as [120] Exhibit 6d—

(Whereupon, the subject panel report was indicated to be Plaintiff's Exhibit 6d for Identification, but was not marked and was left in place in File 6.)

BY MR. SCHAUMBERG:

Q —and ask you whether that document states the reasons for the Regional Board's action. Did you say that was the Panel's report to the Statutory Board or the Regional Board?

THE WITNESS:

A The Regional Board.

MR. GOLDBLOOM: The Panel Report, as I understand it, to—

THE WITNESS:

A The title of this document is, "Panel Recommendations to the Regional Board."

BY MR. SCHAUMBERG:

Q And does that state the reasons for the recommendations?

MR. GOLDBLOOM: Objection. I think the question is objectionable for the same reasons that I have raised before mainly an attempt to characterize the document specifically as to what it contains or does not contain. I think the Chairman is entitled to characterize the document generally, but whether or not it contains reasons—specific, general, [121] or otherwise—I think is irrelevant.

BY MR. SCHAUMBERG:

Q Would you please give us the captions, if any, on that document, Chairman, as you have in the instance previously.

THE WITNESS:

A There are no captions.

Q Then, could you give us a general description of that document, other than its title? How many pages is it?

A Two pages.

Well, it's a report to the Regional Board commenting on the case, and recommending the refund that had previously been determined on a tentative basis.

Now, the next document—

Q Excuse me, just so there is no confusion here on the record, is it possible that these documents, or some of them, are out of their chronological order? Because—

A They are.

Q They are?

A Because now I come to the Report of Renegotiation, which preceded the Panel Meeting.

Q Is that part of the Report of Renegotiation?

A Part 1a and Part 2.

Q Would you give us the captions on Part 2 of the Report of Renegotiation, which I should like to designate as Exhibit 6e?

[122] (Whereupon, the subject document was indicated to be Plaintiff's Exhibit No. 6e for Identification, but was not marked, and was left in place in File No. 6.)

MR. GOLDBLOOM: If I may interject a request here, I realize that I will have an opportunity to cross-examine the witness, but it would be—it would probably make things a little easier if the Chairman could take a look at Part 1a now and determine whether it is in essence any different from Part 1a that he described previously, if you have no objection to that. Otherwise, I will reserve my question until the proper time.

MR. SCHAUMBERG: No, I was just trying to save the 15 minutes that were required previously to identify each heading in Part 1a.

THE WITNESS:

A Well, it is substantially like the Part 1a in the other case, and it is very voluminous, as was the Part 1a in the other case.

MR. GOLDBLOOM: How many pages?

THE WITNESS:

A About 33 pages.

MR. GOLDBLOOM: To Part 1a?

THE WITNESS:

A To the Part 1a.

Now, this report has a Part 1b, and all it says is that [123] the contractor submitted the statement as to performance, and statutory factors, which is in the case file, and incorporated herein by reference.

BY MR. SCHAUMBERG:

Q Thank you. Will you identify the captions on Part 2?

THE WITNESS:

A Application of statutory factors. Under that, Character of Business, Reasonableness of Costs and Profits. Extent of Risk Assumed. Contribution to the Defense Effort, Capital Employed. Efficiency. And then there is a special section which sets forth in great detail a summary of certain performance data.

Next heading is Determination, and under that is Proposed Recommendation.

The next—and this is out of order—is a minute stating that the Board approved a tentative recommendation that the contractor realized excessive profits.

Q Is that the Regional Board?

A The Regional Board. These are Regional Board minutes.

MR. SCHAUMBERG: I'd like to designate that as Exhibit 6f.

(Whereupon, the subject minute was indicated to be Plaintiff's Exhibit 6f for Identification, but was not marked and was left in place in File No. 6.)

[124] BY MR. SCHAUMBERG:

Q Does that minute give reasons for the action?

THE WITNESS:

A It does not.

The next minute states that the Board approved the recommendation of the Panel, and made and entered a final recommendation that the contractor realized excessive profits, and in certain amounts.

MR. SCHAUMBERG: I'd like to designate that as Exhibit 6g.

(Whereupon, the subject minute was indicated to be Plaintiff's Exhibit 6g for Identification, but was not marked, and was left in place in File No. 6.)

THE WITNESS:

A The next minute records the fact that by letter of a certain date the contractor advised that it was not

willing to enter into an agreement for the elimination of excessive profits. An impasse was therefore declared to exist;

MR. SCHAUMBERG: Made that Exhibit 6h.

(Whereupon, the subject minute was indicated to be Plaintiff's Exhibit 6h for Identification, but was not marked, and was left in place in File No. 6.)

MR. GOLDBLOOM: Is that also a Regional Board minute?

THE WITNESS:

A We are still at the Regional Board level.

[125] MR. GOLDBLOOM: Those three minutes then, are—

THE WITNESS:

A —all Regional Board minutes.

Next is a letter to the contractor, notifying the contractor that the Regional Board had made a final recommendation that the contractor realized excessive profits in a certain amount, reciting the fact that the contractor had advised that it was not willing to enter into an agreement, and notifying the contractor, therefore, that in impasse existed and that the Renegotiation Board would reassign the case to itself.

MR. SCHAUMBERG: Let that be designated as Exhibit 6i.

(Whereupon, the subject letter was indicated to be Plaintiff's Exhibit No. 6i for Identification, but was not marked, and was left in place in File No. 6.)

MR. GOLDBLOOM: I'm sorry. What was that?

MR. SCHAUMBERG: It was a letter to the contractor.

MR. GOLDBLOOM: From the Regional Board?

MR. SCHAUMBERG: (Nods head affirmatively.)

MR. GOLDBLOOM: Saying that there is an impasse?

THE WITNESS:

A (Nods head affirmatively.)

MR. GOLDBLOOM: (Nods head affirmatively.)

THE WITNESS:

A This is a letter from the Secretary of the Board [126] to the contractor, stating that the case had been reasigned from the Regional Board to the Renegotiation Board, and that the contractor would be requested in due course to attend a meeting with a Division of the Board in Washington, D.C.

Next is a memorandum of the Office of Accounting addressed to the Office of Review, commenting on Part 1a.

MR. SCHAUMBERG: Let that be marked as Exhibit 6j.

(Whereupon, the subject memorandum was indicated to be Plaintiff's Exhibit No. 6j for Identification. However, it was not marked and was left in place in File No. 6.)

THE WITNESS:

A This is followed by the Review of Determination, Office of Review.

MR. SCHAUMBERG: Let that be Exhibit 6k.

(Whereupon, the subject Review of Determination was indicated to be Plaintiff's Exhibit No. 6k for Identification, but was not marked and was left in place in File 6.)

THE WITNESS:

A Next is a report entitled "Analysis and Recommendation" prepared by a reviewer and addressed to the Accounting Director, Office of Review.

MR. SCHAUMBERG: I should like to have that marked as Exhibit 6l—

(Whereupon, the subject report was indicated to be Plaintiff's Exhibit No. 6l for Identification, but was not marked and was left in Place in File 6.)

[127] BY MR. SCHAUMBERG:

Q —and could you tell us if that document has captions on it?

THE WITNESS:

A First, if I called it a report, it is called a memorandum. It does have captions.

Q Could you tell us what they are?

A Business, Costs and Expenses, Subcontracting, Research and Development, Officers' Compensation, Interest Paid, Contributions, Government Assistance, Net Worth, Performance Information, Statutory Factors.

Under that, The Region. Character of Business, Extent of Risk Assumed, Contribution to the Defense Effort, Capital Employed, Reasonableness of Costs and Profits.

Next is, The Contractor, under Statutory Factors. And a summary of contractor's representations with respect to Character of Business, Contribution, Extent of Risk Assumed, Capital Employed, Reasonableness of Costs and Profits, Efficiency, and then another heading, "This Writer," setting forth his views.

Capital Employed, Efficiency, and then Reasonableness of Costs and Profits, Conclusion and Recommendation.

This is a document entitled, "Record of Meetings." This refers to the meetings between the procurement agency and the contractor.

[128] Next, the minutes of meetings held by the Division with the contractor.

Next is a memorandum from a Board member addressed to the Board.

Q Could you tell us what the import of that document is?

MR. GOLDBLOOM: I would object to a characterization of the document in anything other than the most general terms.

THE WITNESS:

A It dissents from the Division's recommended termination.

MR. SCHAUMBERG: I'd like to mark that as Exhibit 6m.

(Whereupon, the subject memorandum was indicated to be Plaintiff's Exhibit 6m for Identification, but was not marked and was left in place in File No. 6.)

MR. SCHAUMBERG: Excuse me, may I have the Chairman's last answer read back?

(The record was read by the reporter.)

MR. SCHAUMBERG: Thank you.

THE WITNESS:

A Next is a memorandum from the Board, which is the report and recommendation of the majority of the Division.

MR. SCHAUMBERG: I'd like to have that marked as Exhibit 6n.

[129] (Whereupon, the subject memorandum was indicated to be Plaintiff's Exhibit 6n for Identification, but was not marked and was left in place in File No. 6.)

BY MR. SCHAUMBERG:

Q Does that document have captions?

THE WITNESS:

A Well, it does; but I think that if I gave you some of the questions that it would identify the contractor.

MR. SCHAUMBERG: Lets go off the record, please.

(Whereupon, a short discussion was held off the record.)

MR. SCHAMBURG: Let us go on the record.

THE WITNESS: All right.

BY MR. SCHAUMBERG:

Q Chairman Hartwig, does that document have some questions which refer to the statutory factors?

THE WITNESS:

A Yes, it does.

Q Does it refer to all of them?

A One, two, three, four, five, six. It does refer to all of them.

Q Would it be appropriate for you to read the captions which would not identify the contractor involved?

A Well, there is one caption, "Adjustment". I don't think that identify the contractor.

Q Not to me.

[130] A There are requests for records and documents. A request for records and documents under the Freedom of Information Act.

Q Excuse me, Chairman, please. My previous question was whether you would be willing to read the captions on the report and recommendation of the Division which you felt would not disclose the name of the contractor, is that what you are doing now?

A Yes. One caption was "Adjustments" and the other is "Request for records and documents."

Q I see. Thank you.

A And that's it.

MR. GOLDBLOOM: Are there any—let us go off the record.

(Whereupon, a short discussion was held off the record.)

MR. GOLDBLOOM: Let us go back on the record.

THE WITNESS:

A The six statutory factors are captioned here.

BY MR. SCHAUMBERG:

Q Is there then a conclusion?

THE WITNESS:

A And there is a conclusion.

Q Thank you.

A Next is a letter to the contractor informing him that the Board had determined excessive profits in a certain [131] amount, and requesting the contractor to inform the Board no later than a certain date whether it wished to enter in to a bilateral agreement, or whether the Board should proceed to issue a unilateral order.

MR. SCHAUMBERG: I'd like to mark that as Exhibit 6o.

(Whereupon, the subject letter was indicated to be Plaintiff's Exhibit 6o for Identification, but was not marked and was left in place in File No. 6.)

THE WITNESS:

A Apparently the contractor advised the Board that it did not wish to enter into a bilateral agreement.

Next is the order determining excessive profits, and Notice of Order determining excessive profits.

MR. SCHAUMBERG: I'd like to mark those respectively as Exhibits 6p and 6q.

(Whereupon, the subject order and Notice of Order were indicated to be Plaintiff's Exhibits Nos. 6p and 6q, for Identification, but were not marked, and were left in place in File No. 6.)

THE WITNESS:

A The file also contains performance reports.

BY MR. SCHAUMBERG:

Q Is that the entire file?

THE WITNESS:

A That is the entire file with the exception again of the Assignment File, which is a separate file.

[132] Q And I trust, also the Board minutes?

A And the Board minutes.

Q Do you have those available to you?

A The minute recites that the Division Chairman presented the Division's report and recommendation on behalf of himself and the Division, in connection with the review of the proposed determination by the Regional Board that the contractor had realized excessive profits. The third member of the Division presented a memorandum presenting his view. In the absence of one of the Division Members, the Chairman stated that he had mailed the Division report and ate dissenting memorandum to the absent colleague, and that the latter advised him by telephone that the Division report represented his views.

The minute states that the Board approved the Division recommendation, and determined that the contractor realized excessive profits.

One Board member dissented.

The mintue also recites that a copy of the Schedule A which had been revised by the Office of Accounting, would be furnished to the contractor.

MR. SCHAUMBERG: I should like to have that minute marked as Exhibit 6r.

(Whereupon, the subject minute was Indicated to be Plaintiff's Exhibit 6r for Identification, but was not marked and was left in place in File 6.)

[133] BY MR. SCHAUMBERG:

Q Chairman Hartwig, in this case was there prepared a Summary of Facts, and Reasons by either the Regional Board or the Statutory Board?

THE WITNESS:

A Not to my knowledge.

Q Was there prepared a Statement of Facts and Reasons by the Statutory Board or by the Regional Board?

A Not to my knowledge.

Q In your opinion, did the Board have any reasons for this final action it took?

A Each Board member had his own reasons.

Q Are those reduced to writing at any place?

A Not in any Board-approved document. This minute clearly recites that the recommendation of the Division was approved by the Board. It does not recite approval of the Division report.

Q In as much as the two unilateral orders which have been furnished are in the amount of $8 million and $9 million respectively of excessive profits, is it your statement, sir, that whichever one of those unilateral orders is the subject of the case about which you just testified, that the Board did not as a body have any reasons for entering an order in that magnitude?

MR. GOLDBLOOM: I object to the question. I think the [134] Chairman has explicitly stated the nature of the

proceedings contained in each file, and the manner in which memoranda were prepared. The question that you asked is argumentative and irrelevant.

MR. SCHAUMBERG: Irrelevant?

MR. GOLDBLOOM: Right. And if at all relevant, legal in its nature. The Chairman has twice specifically stated precisely the nature of the documents involved.

MR. SCHAUMBERG: I am asking the Chairman a question with regard to his personal knowledge, which does not require any legal opinion whatsoever on his part. I am asking him whether, as a member of the Board at the time this unilateral order was entered, whether the Board as a body had any reason for the order which it entered.

THE WITNESS:

A Well, each Board member who voted for the refund determination had his reasons, but those reasons were not necessarily shared by any one or all of his colleagues.

In the nature of this process, at the Board level, there is considerable discussion of these cases, which is oral in nature. It's not recorded in the minutes; it's not recorded in any document until the Board issues a summary or a statement upon the request of the contractor.

BY MR. SCHAUMBERG:

Q If the contractor were to request a statement, [135] Chairman Hartwig, would it be necessary to reconvene the Board in order to draft that statement?

THE WITNESS:

A No. The—in practice the staff, particularly the staff of the Office of Review, assists the Board in the preparation of a summary. This draft of summary is submitted to the Board members who then furnish their comments, and a final draft, incorporating these comments, and sometimes not incorporating those comments, is then prepared and sent to the contractor.

Q If you were subpoenaed by a Federal Court at this point to give your reasons for that unilateral order, would you be able to do so?

MR. GOLDBLOOM: Objection. Objection. That's a legal question. It's an effort to probe the mind and mental processes of the witness, making a judgment, determination authorized by statute. The question is improper in its entire nature.

MR. SCHAUMBERG: I just have a few more questions.

MR. SCHAUMBERG: To your knowledge, Chairman Hartwig, have there been any instances where the Board has been requested to issue both a summary of facts and reasons, and a statement of facts and reasons?

THE WITNESS:

A There have been such instances.

[136] Q Could you estimate how many there have been?

A Over a period of 19 years, this would be very difficult to estimate.

Q Can you think of any recent examples of that?

A Right now I can't.

Q Is there a particular form that is used by the Board in issuing its statements, facts and reasons, and outline-type form?

A Well, the form differs from the form of the summary, I believe.

Q Can you tell me what form that statement generally takes?

MR. GOLDBLOOM: Do you understand the question?

THE WITNESS:

A What is the question, again?

BY MR. SCHAUMBERG:

Q Well, let me rephrase it: The Board has published certain form letters in the Code of Federal Regulations. Are there similar forms not published, or published somewhere that I haven't seen it, which indicates the manner in which, or the methodology, really, of issuing a statement of facts and reasons?

THE WITNESS:

A I don't think that the regulations set forth such forms. There is no—there is no form as such.

[137] Q From your experience, could you tell us what the form of a preponderance of the statements contain?

A As distinguished from summary?

Q No, sir. Not as distinguished from summary, unless there is a distinction which ought to be made.

A I think that the summary which I've described for the record in one of these cases, is a pretty good example of the form of summary issued by the Board.

Q That was the summary in File 5, the one that we discussed immediately prior to this one?

A I think so.

Q I believe that document was identified as Exhibit 5j, of which Roman Numeral 1 was entitled "Determination, II, Introduction, III, Statutory Factors", with each one of the factors listed there under. And then a conclusion.

A I believe that in some cases the summary would discuss special matters. For example, the question of an exemption might be involved in a case, a legal question. And the summary would set forth the Court's views with respect to the grating or denial of the particular exemption.

Also, there might be some significant accounting issues which would be set out in a separate section, where the Board would discuss its position with regard to the particular accounting issue.

Q Now, while you've stated that Exhibit 5j is typical [138] of a summary, would you say that this document is also typical of the headings in a statement of fact and reasons?

A Substantially the same, yes.

Q Are there any distinctions that you failed to mention?

A Well, of course it bears a different action. It is a statement rather than a summary.

Q Is there anything else?

A That's approximately all I can think of at this point.

Q You stated earlier in your testimony that it is the desire of the Board to enter into agreement with a contractor when there has been a determination of excessive profits. Must that agreement in every instance be in the amount of the Board's or the Regional Board's determination?

A Well, you must view the process from the very beginning, and perhaps—perhaps we haven't discussed sufficiently the case where the Regional Board proposes a tentative determination. In fact, all refund cases originating in the Regional Board, start with tentative determination, and this is the first time in the proceedings that this figure has been approved tentatively—when the contractor at a renegotiation conference is informed orally of the reasons for the tentative determination and is given an opportunity to bring forth any additional information, any additional argument, if he feels that [139] this is required in the case.

So, this is the first opportunity he has to agree or not agree with it tentatively.

Our regulations, then, give him an opportunity, if he wishes, to proceed further, to ask for a Panel meeting of the Regional Board, at which time the Board will review the matter—the Panel will review the matter afresh. If in these negotiations, the contractor can persuade the Panel that the tentative determination is wrong, that figure can be adjusted. That's the first step. And I may add, I may add that it does happen. I don't have the statistics, but it does happen, after a Panel meeting, that the Regional Board will adjust the tentative determination and give the contractor another opportunity to agree.

And if at that point in the negotiations, if it's in a Class A Case, for example, he can come to the statutory Board where, once again, this Board in reviewing the case takes another fresh look at it to see whether in these negotiations, another figure could be a reasonable figure under the fair application of the law.

So this, in my judgment, in a nutshell, shows the constant effort here in our procedure to come up with a fair proposal that the contractor might agree to. And I may

add, the statistics show that the Board's been highly successful in that regard.

[140] BY MR. SCHAUMBERG:

Q One final matter, Chairman Hartwig. It is my understanding that the Board is, pursuant to the mandate from the Court of Appeals, now making available its statements of facts and reasons, with the deletion of identifying detail.

It has also come to my attention that this is being done in a chronological manner. In other words, each time a new statement is rendered by the Board, the appropriate deletions are made, and the statement is then made available to the public in chronological order.

In as much as it is your earnest desire, as you have just stated, to reach agreement with contractors, and inasmuch as Part 1460 of the Board's regulations make it quite clear I think, that a contractor is compared by the Board and is also expected to compare himself against others using the same or similar products or using the same or similar processes, how can a contractor glean any of the principles or standards that are expected to gleaned from these opinions, when they are not separated, at least in this minimal manner, by products, and by processes, but are merely published in a chronological manner? How is that possible?

MR. GOLDBLOOM: The question is argumentative, and irrelevant. The Board—

MR. SCHAUMBERG: Mr. Goldbloom, a moment ago you objected to another question, stating that we must stay within the [141] mandate of the Court of Appeals, and I think I am doing exactly that when I ask the manner in which the Board is complying with the order of the Court of Appeals.

And while you may characterize the question as argumentative, I think the Chairman is quite sincere when he says that he would like to see contractors, even more than they are now, enter into agreement with the Board. And as a representative of the public, I think I can state that the Board's manner of publication is not helping contractors. And I just want to know whether, in the Chairman's view, there might not be an additional conveyance of information to the public by having these Board statements of facts and reasons published in what I would characterize as a meaningful manner, not merely a chronological manner.

MR. GOLDBLOOM: I think you have a very interesting concept, Counsel. I still think your question is argumentative and irrelevant. The Board has, pursuant to the direction of the Court of Appeals, made available to the public its statements of facts and reasons with appropriate deletions as authorized by the Court of Appeals. If you have a quibble with the segregation of these statements of facts and reasons or the manner in which they are made public, outside of the way they are being done today, I suggest you take that question to the appropriate tribunal, whether it be—

MR. SCHAUMBERG: I have no quibble. I think the Chairman [142] is very well prepared, and certainly capable, of answering the questions I have asked. And I don't see that you are benefitting anyone, Mr. Goldbloom, by trying to muzzle him on this question.

MR. GOLDBLOOM: I resent that, the suggestion that I am trying to muzzle the Chairman. You have stated and made a request that is argumentative in nature, and you are asking the Chairman how he might better do something which he has not been required to do, and that is outside the scope of this examination. If you want to question the manner in which the statements have been made available, then you take it to the appropriate agency. The facts are quite clear.

MR. SCHAUMBERG: I am asking the question of the appropriate person at the appropriate time, since we have before us, or before the District Court, a motion that the Board act in accordance with the mandate of the Court of Appeals, and I have before me as the witness at this deposition, the Chairman of the Board, who is empowered to determine how the Board will implement the Freedom of Information Act, and how it will act to comply with the mandate of the Court of Appeals. And I am asking the Chairman whether he has considered any other form of publication other than the one

presently being used, and I will stop the question right there.

MR. GOLDBLOOM: I object to the question on the ground that it is argumentative and that it is an effort to probe [143] the mental processes of the witness, which is improper. The fact is that what has been done is a clear matter of record. If you are dissatisfied with that, then you should seek an appropriate remedy. Otherwise, this witness is not—it is not necessary that this witness answer that question.

MR. SCHAUMBERG: I suggest to you, Mr. Goldbloom, that you should allow the witness to answer the question, if he would like to answer it.

MR. GOLDBLOOM: I have stated my objection, and I have directed the witness not to answer.

BY MR. SCHAUMBERG:

Q Chairman Hartwig, can you tell me anything about the manner in which your minutes are presently made available to the public?

THE WITNESS:

A Well, as you stated, the Statements of Facts and Reasons are placed in the Public Information Library of the Board, and we have endeavored in good faith to comply with the mandate of the Court of Appeals with respect to the matter of deletions.

Q Do you foresee a time, sir, where you will have rendered hundreds of opinions which will all of had the identifying details deleted so that they will be simply a conglomeration of documents from which no meaning can be gleaned?

[144] MR. GOLDBLOOM: Objection. The question is argumentative. The Chairman has already stated what the Board does and has done pursuant to the order of the Court of Appeals. If you have some quibble with that I suggest that you take it to an appropriate agency.

MR. SCHAUMBERG: I have no further questions, gentlemen.

MR. GOLDBLOOM: I would like about a five-minute recess.

(Whereupon, a short recess was taken from 5:35 until 5:45)

CROSS-EXAMINATION

BY MR. GOLDBLOOM:

Q Mr. Chairman, on Friday, your deposition commenced, and over the weekend both the plaintiff and the defendant obtained a prompt transcript of the testimony that was taken on Friday, and I furnished you with a copy of that this morning, did I not?

THE WITNESS:

A Yes, you did.

Q I believe you advised me that there were some minor corrections that you wanted to make in a statement that appears on page 36, and if so, would you like to explain?

A Yes. You will recall that I testified that typically, in the Class A Clearance Cases that we were discusses, each Board member receives a copy of the review of determination, a copy of the reviewer's recommendation, if there was one, [145] a copy of the memorandum of the Office of Accounting addressed to the Office of Review, and a copy of the Report of Renegotiation.

The question was asked whether these documents were retained by the Board members and I checked since my testimony and wish to correct the statement that I made on Page 36.

Each Board member, after the case has been decided, returns those copies to the central files. He does not retain them in his own files.

Likewise, in a case involving a refund, where similar documents including an analysis from the Office of Review are supplied to the Board members, these documents are returned to the central files after the case is closed.

Q Mr. Chairman, how many members are there of the Renegotiation Board?

A There are five.

Q It is my understanding that the members of the Renegotiation Board are appointed to that position by the President, subject to confirmation by the Senate, is that correct?

A That's correct.

Q Is the same true with respect to Regional Board members?

A Regional Board members are Civil Service employees.

Q What is the basis for the creation of the Regional Board?

[146] A The Regional Boards are created in order to assist the Statutory Board in processing the large volume of cases which we receive. It permits us to decentralize the operation, particularly in the Class B area.

Q Who appoints the Regional Board members?

A The Statutory Board.

Q And you say they are Civil Service employees?

A Yes.

Q Throughout your direct examination you have been questioned concerning various reports of renegotiation that are contained in these files. Can you tell us why a report of renegotiation is prepared?

A A report of renegotiation is prepared in order to assist the Board in its efforts to reach agreement with the contractor, whether excessive profits are found.

Q I believe when you were testifying concerning files 5 and 6 you described in some detail Parts 1a and Part 2 of the Report of Renegotiation. Who prepares Part 1a?

A The accountant.

Q Who prepares Part 2?

A The renegotiator.

Q Is this typical of the way in which the report of renegotiation is prepared?

A This is typical, if you understand that in some cases a Regional Board member as such acts as a renegotiator.

[147] Q I believe that in the File 5 and 6 you examined the documents which constituted the Report of Renegotiation, and that they were rather lengthy documents with schedules. Can you give us an estimate of the size of the documents, roughly?

A The number of pages?

Q The number of pages.

A I think in the two cases we examined, the report of renegotiation could approximate as much as 50 pages, 40 or 50.

Q I see. That would include Part 1a and—

A 1a and Part 2.

MR. SCHAUMBERG: For purposes of clarifying the record, could you give a breakdown of your estimate of the number of pages.

BY MR. GOLDBLOOM:

Q I am talking about in general terms.

THE WITNESS:

A The documents are here. We can count the pages, if that's important.

Q Well, we can come back to a count in a minute.

MR. SCHAUMBERG: Mr. Goldbloom asked the question, so I thought the record should reflect an accurate count since he asked it.

THE WITNESS:

[148] A Well, may I say that in those refund cases, the report of renegotiation would tend to be more extensive than in the clearance case. And in fact, as I testified, in some clearance cases we have a short form.

The report of renegotiation in Exhibit 5 had 45 pages.

BY MR. GOLDBLOOM:

Q In its entirety?

THE WITNESS:

A In its entirety.

Q Can you break that down between parts 1a—

A 38 pages, Part 1a. And the balance, Part 2.

Q I believe you stated that Part 1a is furnished to the contractor.

A It is, upon their request.

Q Upon the contractor's request. Is Part 2 furnished to the contractor?

A It is not.

Q Do you have some figures on Exhibit 6 for report of renegotiation?

A Yes. The Part 1a comprised 43 pages, and Part 2, 11 pages, for a total of 45 pages.

Q At various points in your testimony, in your direct testimony, you made a point of stating that the various internal memoranda which you were describing, such as the report of renegotiation, the reviewer's report, the Panel [149] Division Report, etcetera, passed along a recommendation to the Board. And at various points you indicated that the Board either approved or disapproved the recommendation, but did not adopt the report. Can you explain why that is so?

A As a practical matter, as I think I said earlier, the Board would never get the job done as expeditiously as Congress intended for it to be done, if a Board agreement had to be secured with respect to every report which is submitted to it. Another reason that the Board operates this way is that this is a judgemental type of operation where Board members may disagree with each other respecting the evaluation of a particular statutory factor; but, nevertheless, can agree on the decision. Frequently it happens in Board discussions that one Board member will emphasize one factor more than another. Or, I know of instances where, upon review of a proposed clearance, an individual Board member might criticize the report of renegotiation because it omitted something. He may even question whether the recommendation incorporated in that report is sufficiently supported in the report itself.

But when he makes an independent examination of the file he may find, for example, a performance report which convinces him that the recommended clearance is appropriate, even though the particular renegotiator may not have commented favorably on the contractor's performance. [150] This will simply illustrate how these cases come before the Board.

There may be a case where one Board member will consider that the clearances are justified, clearance is justified, in his own mind, because the overall costs are reasonable. Another Board member might not be impressed by that point, he may consider that perhaps the overall costs are not low costs, but simply reasonable costs, but be more impressed by the contribution to the defense effort than his colleague. Nevertheless, despite the differences in evaluation, they can agree on the result.

Q Is risk another area of subjective judgment?

A Risk as such is another area where it is very easy for people to disagree in the evaluation that they accord risk in a particular case.

Complexity of business, complexity of the product or the manufacturing process is another factor which calls for a considerable amount of judgment, where people can differ in the emphasis they place on the question of complexity.

Q Now, in a hypothetical case, let's say, where a contractor has been renegotiated and there is pending before the Board at a Board meeting the recommendation for a refund in a specific amount, will there characteristically be a discussion by the Board members of the various factors?

A There will be a discussion.

[151] Q Will this discussion be limited to the concepts or statements that are contained in the report of renegotiation?

A They will not be limited to those concepts.

Q Will they be limited to the concepts or analysis that may appear in a Division panel report to the Board?

A They will be not limited to those concepts.

Q Will they be limited to the concepts of the report of the Office of Review?

A They will not be so limited. As I pointed out, the case file is available to each Board member and quite often the Board member may independently review that file to decide for himself what evaluation to give that case. I know there are instances where I've seen these reports, and on the surface have felt that I should do some independent investigating, in which case I would either

call for the case file or have someone investigate a certain point in the case file for my benefit.

Q In that circumstance, you would be satisfied that the report of renegotiation does not fully explicate your views on the subject that are dealt with?

A That's right. Some reports, some analyses are very ellyptical, and you can see this from the record, and it is possible in this judgement area that you disagree with the manner in which someone has discussed or treated a certain factor.

[152] Q That's in your direct examination toward the close, you were discussing and describing a document in, I believe, File 6, and you pointed out that there is headings contained in that analysis and recommendation by a member of the Office of Review, set forth under the Statutory Factors, divided between the region, the contractor and "This Writer." Does that suggest, without looking at the file, does that suggest that there were differences in the analysis?

A Oh, yes. There could be differences between the reviewer and the renegotiator. And as I pointed out, the Director of the Office of Review sometimes disagrees with the reviewer's evaluation.

Q I notic that in various of these files, the Board considers not only the analysis prepared by the reviewer, but also requires a recommendation from the head of the Office of Review. Is that correct?

A That's correct.

Q So that the Board does not require the reviewer's analysis to be subsumed in the analysis of the Office of Review?

A Well, it does not express the official view of the Office of Review, in some cases.

Q Is the Board trying to get one analysis?

A The Board is trying to get the benefit of the views of the Director as well as of the reviewer.

[153] Q You spoke a moment ago about the Board's statutory obligation and the amount of business that it has. Do you have any figures which would show the number of cases handled by the Board, either on an annual basis or, say, from its inception?

A Yes. I have figures which will appear in the Board's 1970 Annual Report, which speaks as of June 30, 1970. And that report discloses that since the inception of the Renegotiation Act, the Board has made 4,006 determinations of excessive profits, in a gross amount exceeding $1 billion. Of that number, 3,524, or 88% of the total, culminated in agreements with contractors.

And this statistic, in my opinion, shows that the Board is carrying out the Congressional mandate that excessive profits shall be eliminated by agreement in an expeditious manner.

Q Now, Mr.—

A This is why our procedure is informal. We are trying to reach agreements. The entire procedure is directed toward that objective.

Let me complete the figures: There were 482 orders during the same period, of which 203 were appealed to the Court, which is a very small percentage of the total of 4006 determinations, which shows I think, that the procedure works.

Q Does—

[154] Now, last year the Board screened 4853 filings, and issued Clearances without Assignment in 4163 cases: 690 were assigned to Regional Boards. This will give you some idea of the volume of work that the Board has.

Q So that the figure that 4006 evaluations of excessive profit since its inception does not include the yearly determinations which result in clearance of the contractor?

A It does not.

Q Can you explain briefly what is a clearance, what does it mean?

A Well, you start with the provision of the statutes. Congress has said that the Board shall endeavor to make an agreement with the contractor with respect to the elimination of excessive profits. And it is only in those cases where we have failed to make such an agreement, at the end of the road, as it were, that we issue a unilater order. So the entire thrust of the statute is the elimination of excessive profits.

If the Act is read, you won't find the word "clearance" mentioned at all. The Act simply says that if the Board does not make an agreement or an order determining the amount of excessive profits within a case, within the prescribed limits of time, the contractor's liability under the Act is discharged. Technically, then, I suppose the Board could in effect grant a clearance simply by not making a determination of excessive profits. And so, the —but that would not be [155] good administration, and therefore we issue clearance notices to inform the contractor that we have "signed off" in our efforts to eliminate excessive profits where they are found to exist. It is our policy and our practice as soon as we have enough information to convince us that there are no excessive profits.

Q Does a clearance have any precedential value for a contractor, say, in a following year when it files its report with the Renegotiation Board?

A Well, there are—there is a section of the regulations which should be mentioned, and that's 1460 dash, or 1460.2(D) which states that renegotiation settlements for prior years are not controlling precedents.

And in effect it says that determinations of excessive profits will be predicated on the facts and circumstances of the year under review. So if a contractor receives clearance in one year because, let us say, he was very efficient or had great risk, it doesn't necessarily follow that the same result would be obtained in the next year, because each year must stand on its own feet. And the facts of each year are different.

Q Suppose there are questions of accounting allocations. Is that controlled by a clearance notice?

A Well, the clearance notice itself in the form that is set out in the regulations, 1498.6—and the two paragraphs [156] which I will read into the record, are the same whether the clearance is without assignment or after assignment. Those paragraphs read as follows:

"This instrument shall constitute the final action by the Government with respect to renegotiation, pursuant to the Act for the fiscal year under review. That the Government shall have the right to withdraw this notice if it should later appear that the data upon which the

determination set forth in Paragraph 1 hereof has been made, does not reflect correctly the renegotiable business of the contractor for the fiscal year under review, or contains any incorrect statement of a material fact. In the event of such withdrawal, renegotiation will be conducted with the contractor as if this instrument had never been issued."

And then this paragraph: "This notice does not necessarily constitute an approval or disapproval of all the methods used by the contractor in determining renegotiable sales and profits or losses for the purpose of any subsequent fiscal year."

Now, you may ask you does the Board have the right to withdraw a clearance notice? We come back to the paragraphs in the Act which govern this activity.

The first period which is significant is the one-year period for commencement of renegotiation, which is a technical term in the statutes. The Board must commence renegotiation [157] prior to the expiration of one year following the date upon which the contractor has made his filing. If the Board does not commence within a year, all liability of the contractor under the Act is discharged.

As a normal practice we do not commence renegotiation at headquarters. And so, with respect to the many thousands of cases where we issue clearances without assignment, these notices go out before the expiration of the expiration of the, the Board has the right to withdraw the clearance. With respect to cases assigned to the Regional Boards, where renegotiation is commenced, there is another provision of the statute, which states that if an agreement or order determining excessive profits is not made within two years following commencement, then upon the expiration of such two years all liabilities of the contractor for this excessive profit are discharged.

In cases where there is a clearance after assignment, that clearance notice is usually issued before the expiration of the period for completion. And so, that notice, like the notice of clearance without assignment, can be withdrawn until the two years has elapsed.

Q Why does the Board make a disclaimer as to the specific methods of accounting that a contractor may use when it issues a clearance notice?

A Well, in the first place, sometimes the accounting [158] data which is supplied may be in error, and it may be discovered although more important than that, I think, is the pragmatic point that we are in the business of eliminating excessive profits. And therefore, if in a particular case a contractor may contend that a certain item of cost is allowable against renegotiable business, and in his filing takes that allowance, but the amount is so small that it would not affect the overall picture, the Board will not spend time arguing with the contractor about the validity of this allocation, since it would not make any difference in the end result anyway, reserving the right, then, in a future year where it does make a difference, to pursue the matter with the contractor.

Q Now, in a given case, this problem or this aspect of the methods of allocation, is it correct to say that they may be accepted, say, by the Office of Accounting of the Board in Part 1 of the Report of Renegotiation, or by the accountant, rather, in his preparation of Part 1a of the Report of Renegotiation?

A Yes, it is possible that the accountant will permit the cost to stand as a renegotiable cost, but noting the amount and directing the Board's attention to the fact that perhaps the cost should be disallowed. Since, however, the amount is so small, it is not worth the argument in a particular year, and it's a pragmatic way of disposing of these cases without pursuing matters which wouldn't make any difference [159] anyway.

Now, the same is true sometimes with respect to exemptions taken. The contractor may make his filing and let us say, has claimed a commercial article exemption in a small sum, let us say, $5000 in a $10 million picture. We may have serious questions about the propriety of that exemption and so we carefully note, when he gets his clearance, that we have not decided for precedential purposes that the exemption is appropriate.

Q I see. In describing the Board's issuance of unilateral orders, I think you indicated that there were

482 unilateral orders issued by the Board, up to the end of this past fiscal year.

A Right.

Q As Counsel had directed to describe the files, I believe you talked about only two separate files which involved the issuance of unilateral orders.

In one file, the summary of facts and reasons was issued by the Board, and in the other file, no such document nor a statement of facts and reasons was issued. Can you tell us from your experience in the 482 unilateral order cases issued by the Board over the years, what is generally the practice of contractors concerning requesting a summary of facts and reasons [160] in connection with the issuance of the unilateral order? And of course I recognize that the summary is issued prior to the issuance of the unilateral order.

A At the present time the vast majority of contractors request summaries. And I don't know the statistics on statements.

Now, let me say another thing about summaries: I don't know that the record has brought this out: the contractor at the regional level is entitled to a summary of facts and reasons where the Regional Board is proposing a refund. Again, this is an administrative document, which is designed to win agreement. And so, we find these days that more often than not—I don't know what the statistics are—but it could well be in 85% of the refund cases—the contractor requests from the Regional Board and receives a summary of facts and reasons, before the Regional Board makes its final recommendation.

So, that's one summary.

In an impasse case, when the case comes up to the Statutory Board, if the Statutory Board finds, determines, that there is excessive profits, before it so issues a unilateral order again, our procedure gives the contractor the right to request another summary, a summary from the Statutory Board, to enable him to decide whether to agree or not.

So that in many cases these days a contractor who at the [161] end of the road has received a unilateral order has had two summaries, in addition to the oral explana-

tion that I described, made by the renegotiator in the first instance of the renegotiation conference.

Q It is possible that in such a case where two summaries have been issued, that the contractor may request a statement of facts and reasons after the issuance of the unilateral order?

A It is possible.

Q I would like to go, briefly, into the preparations of the summaries and statements. The contractor requests the summary or statement, and I believe you testified that the manner of preparation between the two was not dissimilar. Can you briefly describe how the summaries or statements are prepared?

MR. SCHAUMBERG: May I just interrupt? In light of the lateness of the hour, I'd like to make a telephone call. So that I don't get into trouble at home.

(Whereupon, a very short recess was taken.)

THE WITNESS: Will you please read the last question?

(The record was read by the reporter.)

THE WITNESS:

A The summaries are prepared here at headquarters by the staff. If, of course, there are accounting questions, the Accounting shop will participate in the drafting of the [162] section on accounting. If there is a particular matter involving an exemption and a legal issue, the General Counsel will have a particular interest in the preparation of that part of the summary. But primarily the responsibility at the staff level for the preparation of the entire document is vested in the Office of Review. It prepares a draft which is then circulated to each Board member, who submits his comments to the Office of Review for incorporation in the final drafts.

BY MR. GOLDBLOOM:

Q Does the same practice go with respect to a statement?

THE WITNESS:

A The same with a statement.

And it then does prepare the final draft which is issued by the Secretary.

Q Is that a Board-adopted document?

A It is.

MR. SCHAUMBERG: When you say "that", Mr. Goldbloom, what do you mean?

BY MR. GOLDBLOOM:

Q Either the summary or the statement, are those—is either the summary of facts and reasons or the statement of facts and reasons adopted as a document issued by the Renegotiation Board?

THE WITNESS:

[163] A The Board members will acknowledge that this document will be issued to the contractor, and initial the draft which is submitted to them.

Q I see.

A And they know that that will go out as a Board document.

Q I see.

Now, you are familiar with Part 1a and Part 2 of the Report of Renegotiation, in general. You are familiar with the report of the Panel Division, and you are familiar with the report of the Office of Review, and the reviewer's analysis of a case.

Is the summary or statement issued by the Board a restatement of those various memoranda?

A Well, there is no attempt to summarize those memoranda, if that's what you mean. It's a fresh document.

Q It is prepared anew

A It's prepared anew. Now, obviously some of the points in the case that may have been discussed in some document here and there may get into the summary, but the document, the summary itself, is a new document.

Q Does the summary or statement, when it is passed around among the various Board members, ever get edited?

A Well, Board members may revise a sentence or correct typographical errors, or make some changes here and there [164] in the summary. Yes. In that sense it is edited by individual Board members.

Q Mr. Chairman, you spoke about the library of the Renegotiation Board. Are you familiar with the types of documents which the Board makes available to the public in this library?

A I am, generally, familiar with those documents.

Q Could you list them for us?

MR. SCHAUMBERG: I would like to object to the question, Mr. Goldbloom, since as you have so often reminded me, we are here to discuss the Board's minutes and not its general and overall compliance with the Freedom of Information Act.

MR. GOLDBLOOM: Well, the question is in this case to what extent has the Board complied with the mandate of the Court of Appeals in this case.

MR. SCHAUMBERG: If that is the question, then I would like to go back to some of my older questions.

MR. GOLDBLOOM: Well, the question before the Court that you have raised is compliance with the order of the Court of Appeals. To the extent that this Board has complied with the order of the Court of Appeals in the face of your charges that it has not, this witness, the Chairman of the Board, is entitled to say in what manner the Board has complied with them.

MR. SCHAUMBERG: Yes, but the Court of Appeals spoke only, I believe, as you again have reminded me frequently, about the [165] Board's opinions. It didn't speak to some of the other documents that may be available in the library.

MR. GOLDBLOOM: Well, I will ask the witness to answer the question, and if you have some question about it you can raise it at the appropriate time.

MR. SCHAUMBERG: Of course you have the advantage over me there, Mr. Goldbloom, since you are his Counsel. But I think integrity would require that we both play by the same rules.

MR. GOLDBLOOM: Well, I play by the rules, and this is a natural consequence of having a witness testify.

But I think the question is fair and appropriate, and within the confines of this case.

MR. SCHAUMBERG: My objection stands.

MR. GOLDBLOOM: You may answer.

THE WITNESS:

A We have placed in the Public Information Library, with appropriate deletions, agreements determining excessive profits, orders determining excessive profits, statements of facts and reasons, letters—not-to-proceed, clearances after assignment, clearances without assignment, where there was express Board action, clearances without assignment pursuant to the delegation of authority to the Office of Screening and Exemptions, decisions on applications for commercial exemptions, decisions on new durable productive equipment [166] exemption claims, decisions on applications for stock item exemptions, special accounting agreements, and in addition to these of course, the Board's regulations, a book of interpretations, general orders that affect the public, and administrative orders that affect the public.

BY MR. GOLDBLOOM:

Q What is a Letter not to Proceed? You referred to that.

THE WITNESS:

A A Letter not to Proceed is a letter informing the contractor that the Board does not intend to proceed further with the case because it has determined that the contractor's renegotiable sales are below the million dollar floor.

Q And so a clearance notice is issued only when the contractor's sales are above the statutory floor?

A That is correct.

Q Now,—

A Excuse me now, just one refinement: where contractors are under common control, and where the group is over the floor, some individual members of ate group may have renegotiable sales of less than one million dollars, but that member of the group in that case would

receive a clearance. It is over the floor by virtue of the fact that it is under common control.

Q With respect to unilateral orders issued by the [167] Board that are now placed in the Board's—in the Board's library, is there an indication of dissenting votes by Board members?

A Yes.

Q Is there an indication as to members who are present?

A Yes.

MR. GOLDBLOOM: I have no further questions.

THE WITNESS: May I be permitted to elaborate on my answer with respect to the preparation of the summaries?

MR. GOLDBLOOM: Yes.

THE WITNESS:

A I did not mean to imply by my answer that the Board members did not make substantial contributions to the drafting of the summaries. They do. In other words, it isn't solely a matter of editing or making minor changes. The changes that have been suggested could be matters of substance.

BY MR. GOLDBLOOM:

Q I see. If A Board member dissented in a given case and wanted to file a dissenting opinion when the Board submitted its summary or statement, would that dissent be sent along to the contractor with the Board's summary or statement?

THE WITNESS:

A It would.

Q So any Board member has the prerogative?

[168] A Right.

Q And that would be his dissenting opinion?

A Right.

MR. GOLDBLOOM: I have no further questions.

MR. SCHAUMBERG: Just so the record is complete, let us show that Mr. Howard W. Fensterstock, the General Counsel of the Board, as well as Patrick Kildea, an attorney with the Board, is present at the hearing.

REDIRECT EXAMINATION

BY MR. SCHAUMBERG:

Q Chairman Hartwig, do you recognize a document entitled "Delegation by the Renegotiation Board to Regional Boards," which was attached to our Motion for an order in accordance with the Court of Appeals, Exhibit A?

THE WITNESS:

A Yes.

Q Can you tell us what the import of that delegation is?

A Well, the delegation, of course, speaks for itself. But to summarize it, if I may, this is the Regional Board's authority with respect to certain functions, powers and duties as the caption indicates. They are empowered to issue clearances and enter into refund agreements in Class A cases, provided that the headquarters Board has advised that it is now in accord with such determination.

[169] In addition, they have authority to issue clearances and enter into refund agreements without approval of the headquarters Board in Class B cases. They also have authority to issue unilateral orders in such cases where they find that excessive profits exist.

Q So is it correct that in Class B cases there is no provise for Statutory Board confirmation, it is only in Class A cases that the Statutory Board must signify its accord with the Regional Board's determination?

A That's right.

Q You stated in response to a question posed by Mr. Goldbloom that the report of renegotiation, Parts 1a and 2, are prepared to assist the contractor in coming to an agreement with the Board with respect to the existence and thereupon the elimination of excessive profits, is that correct?

MR. GOLDBLOOM: Excuse me. I didn't realize that the witness ever testified that Part 2 was designed to assist the contractor, or even that Part I was. I think he testified that Part 1 is to make certain that the contractor and the Regional Board were operating with the same set of figures, or at least knew what the accounting issues were. But—

THE WITNESS:

A Well, this document is prepared to assist the Board in its efforts to come up with a determination and reach an agreement in a refund case.

[170] BY MR. SCHAUMBERG:

Q Could you explain what you mean by that?

A If for instance a staff document, which is designed to assist the Board in its exercising its duties to ascertain first whether there are excessive profits, and secondly what the amount of these excessive profits should be, what they should determine them to be.

Q And what is made available to the contractor so that he can enter into these discussions with the Board?

A Part 1a is made available to the contractor.

Q Is Part 2 made available.

A Part 2 is not made available. This is an intra-agency communication by the Renegotiator to his superiors, namely the Regional Board.

Q I believe you testified that the Report of Renegotiation is ordinarily more extensive in refund cases than it is in clearance cases, and I think you made that statement at about the time that you counted the pages in Files Nos. 5 and 6. Could you explain that answer?

Q Well, in the very nature of things, a refund case is much more controversial and therefore the contractors make more elaborate presentations, raise more points for consideration, and additionally of course, there is the desire to put your very best foot forward when you are proposing a refund. The contractors don't get quite as excited about clearances [171] as they do about refunds.

Q When you say "in a refund case as opposed to a clearance case," you mean a Clearance without Assignment, then?

A Clearance without Assignment, and in some instances, Clearances after Assignment.

Q Well, if it's a Clearance after Assignment, how does the renegotiator know at the time he is preparing his report what the outcome of the case will be?

A There are some instances where a report of a Clearance without Assignment will be quite extensive, and this is a case which may involve, let us say, rather serious accounting questions, perhaps exemption questions, and even factor evaluation.

Q You also testified that renegotiation is "judgmental," I believe was your word. And I believe what you were saying is that there are a number of different factors which are to be considered under the statutes, and different Board members, whether they be Regional or Statutory Board members, may give these various factors different weight. And you used that as an explanation for why it is not always possible to state that there is any opinion of the Board as a body when it has not adopted a particular summary or a particular statement of facts and reasons.

MR. GOLDBLOOM: I am sorry. I don't think that is what eh—

[172] THE WITNESS:

A I didn't say that.

BY MR. SCHAUMBERG:

Q Well, please correct me. What did you state about that?

THE WITNESS:

A I said that this is the reason why these various staff recommendations such as the Report of Renegotiation, the recommendation of the Office of Review, the comments of the Office of Accounting—this is the reason why the Board does not adopt any one of those documents. Otherwise we'd become a debating society.

Q But I understood you to say in addition to that, that—

A Yes?

Q —the Board members are not always in agreement for the results for the unilateral order, or the determination that there are excessive profits, because they each one of them may be giving different weight to different factors. Did you not say that?

A Well, there are cases where they dissent. But I was speaking of cases where there is no dissent, but where the Board members agree on the result.

Q Right.

A They may agree to a ruling, agree that it's a [173] clearance, and yet disagree with each other as to the relative weighting of the factors.

Now, let me just elaborate on this business of renegotiation being a judgment operation. Congress very clearly has said to this Board that it shall not determine excessive profits in accordance with any formula for specific percentages. This is why the factors are so broad, and this is why it is a judgment operation.

Q Now, what about the instance where the Board members agree that there are indeed excessive profits? Are you suggesting that they may come to this conclusion for different reasons?

A They might.

Q Well, I believe you testified earlier that in fact they do, since you have discussions around the table about the various reasons, etcetera, is that correct?

A They might all agree on the amount of excessive profits, but there may be some difference as to the relative weighting of the factors.

Q Well, which do they decide on first, the amount or the factors?

A They decide on the factors, and then see how it comes out, whether or not there is a concensus decision, whether there is a judgment that all can agree with, a result they all can agree with.

[174] The other thing that I want to stress with respect to the nature of this process is that our procedures are informal and non-adversary. That's another way of saying that. That's why we're not subject to the Administrative Procedures Act.

Q Are you suggesting that the publication of further documents would make it an adversary proceeding?

A I'm not suggesting that at all.

Q You quoted some statistics as to the number of cases that the Board has decided, or did have before it, over its 19-year history. Would you be able to tell us from these statistics how many dollars are accounted for by the 482 unilateral orders to which you made reference?

THE WITNESS: Let us go off the record.

(Discussion off the Record.)

THE WITNESS: Let us go back on the record. Will you repeat the question?

(The record was read by the reporter.)

THE WITNESS:

A I do not immediately have on hand the information through June 30, 1970, but I can give you an answer through June 30, 1969. That information is contained on Page 12 of the Board's 1969 Annual Report.

Through June 31, 1969 the gross amount of dollars involved in cases that resulted in agreements was $698 million, or 70% of the total. The gross amount involved in cases [175] concluded by unilateral orders was $298 million, or almost 30% of the total.

BY MR. SCHAUMBERG:

Q Referring to your earlier testimony, do you recall what you stated about the results of the number of agreements as opposed to unilateral orders?

THE WITNESS:

A I think that the number of agreements the Board has reached evidences the fact that the procedures which the Congress set up under this Act, stressing as it does the reaching of agreements, has worked.

Q In that case, would you turn to the line for fiscal year 1969, on Page 12 of the '69 Annual Report?

A All right.

Q What do those statistics indicate as to percentages of determinations by agreements versus percentage of agreements by order in dollar volume?

A Well, I think I just gave that information.

Q No, I think you gave it through 1969. I am asking you for the most recent fiscal year, at least that this publication deals with.

A Oh, you mean during that fiscal year?

Q Yes.

A In Fiscal '69 there was a total of $21 million in determinations, and $9.8 million was reached by agreement, [176] or 46% of the total. And 11.4 million by order, or 53% of the total.

Q In other words, less than half of your cases in terms of dollar amounts are now settled by agreement in 1969?

A But in terms of the number of cases, I refer you to Table 1.

Q I am asking you about Table 2, Chairman.

A Well, I have given you—

MR. GOLDBLOOM: The answers and the facts speak for themselves, but I think the Chairman is entitled to elaborate on his response.

BY MR. SCHAUMBERG:

Q I will ask you about Table 1 if you will answer my question about Table 2. Isn't it correct that over half the cases in 1969, when we are speaking about dollar volumes, were determined by unilateral order and not by agreement?

A Yes, the percentage is 53%.

Q Now, turning to Table 1 which covers these statistics rather than by dollars, by number: what is the total percentage through 1969 of the number of orders entered into by agreement and by order?

A The cumulative total through 1969 shows that there were 3,456 cases in which refunds were agreed to, or 89% of the total, and 427 orders or 11% of the total.

Q And what are the comparable figures for just fiscal [177] year 1969?

A In fiscal year '69 out of a total of 82 determinations, 54 were agreement, or 65.9% of the total. 28 were by order, or 34.1% of the total.

Q So again, would it be a correct statement to say that in 1969 three times as many cases were terminated by order than the average for your 19-year history?

MR. GOLDBLOOM: The figures speak for themselves, Counsel. I think if you want to make an argument about the figures, you are entitled to, but these are . . .

MR. SCHAUMBERG: I was just trying to complete the record, Mr. Goldbloom.

MR. GOLDBLOOM: Fine.

BY MR. SCHAUMBERG:

Q I believe you quoted some language from Board Regulation 1498.6, which is the Board's clearance notice. Could you tell me in your own words what those two paragraphs were intended to convey?

THE WITNESS:

A Well, the first paragraph, in my judgment, says that the Board may withdraw the clearance notice if it appears that the renegotiable business of the contractor for the fiscal year in the review is incorrectly stated, or if there is an incorrect statement of a material fact which has been made, presumably by the contractor.

[178] Q Now, on that point, would the same not be true if we were talking about a unilateral order of the Board determining excessive profits, that if there has been a misstatement by the contractor of a material fact, that that order would not be final either?

A I don't think so. I think that—we are not talking about fraud here, and even though there is an incorrect statement about renegotiable business, it turns out that the Board, let us say, has improperly allowed the contractor to take an exemption, the Board could not reopen the case once it issued the unilateral order.

Q That's not what Paragraph 3 refers to, however. Paragraph 3 refers to the fact that the data does not reflect correctly the renegotiable business of the contractor, or contains any incorrect statement of a material fact.

And I think you referred to these paragraphs, or counsel asked you to refer to them, to show that in these clearance notices they were somewhat ephemeral in nature because they could be reopened if there were some misstatement of fact.

I am asking you whether it wouldn't be the same if it were a unilateral order determining excessive profits, if there were a misstatement of fact, or that the data supplied by the contractor were incorrect.

A Well, again, we are in a legal question here.

MR. GOLDBLOOM: There is a section of the Act which refers to fraud.

[179] BY MR. SCHAUMBERG:

Q Mr. Hartwig, perhaps this question will take care of the problem: have there been very many instances where a clearance notice has been withdrawn because of misstatement of fact?

THE WITNESS:

A Well, we have them. But in terms of the thousands of clearance notices that we issue, there have been relatively few.

Q Would you say less than 10 in your 19-year history?

A Oh, I would say that—more than that.

Q It is a negligible amount, in any case, compared to the number of cases you have?

A "Negligible" is your word. I'd say it was a small amount.

Q All right. Thank you. You've stated that the vast majority of contractors—and I am using your words—request a summary, and then you elaborated and said that approximately 85% of them ask for a summary at the Regional Board level. And perhaps—I am not certain if you said this or not—is it correct that you would estimate that a comparable number would also ask for it at the Statutory Board level?

A Well, in the first place I don't know that I said [180] flatly 85%.

Q You used the figure as an estimate.

A I thought I said it would be as much as 85%. That's what I intended. I really don't, I don't know. I haven't made a count.

Q Uh-huh.

A But I was simply illustrating that it's certainly more than 50% these days.

And the same would be true at the headquarters.

Q Well, now, I asked you during direct examination whether very many contractors who had requested a summary subsequently request a statement of facts and reasons, and I believe that you testified at the time that that is rarely the case. Now, please correct me if I'm wrong.

A I don't know whether I would say that it is rarely the case. You must remember that we do reach agreements here after we issue a summary, so, there are still a substantial number of cases where, after we've issued the summary, the contractor says, "I will agree."

So in a case like that you wouldn't have a statement of facts and reasons. Then, they, the contractors, would not ask for a statement of facts and reasons after the issuance of the order, if he doesn't intend to go to the Tax Court, and, the recent figures show that out of 582 orders to date, there were only 203 appeals.

[181] So that, in 279 of those orders, there would be no request for a statement. I don't know of a case where a contractor asked for a statement of facts and reasons unless he was headed for the Tax Court.

Now, however, we are talking about 19 years, and there may have been such a case. But I have a general impression that when such a statement is requested it's normally requested for the purpose of going to the Tax Court.

Now, just to fill out this answer: I think there are instances today where contractors do not request statements, but will take the summary and attach it to their petition in the Tax Court. As a matter of fact, that is what happened in this one refund case we examined here. I think that summary was attached to the petition in the Tax Court, and thereby began public information.

Q You stated again on cross-examination, I believe you said in your affidavit that there was always a possibility that these summaries will be changed. How frequently does that happen, that a summary is—or the facts contained in the summary change from the time that the summary is rendered by the Statutory Board and the unilateral order—if that is the result—is issued by that Board?

A Well, as a matter of statistics it would be in a small minority of cases.

Q Then as a matter of statistics, would it be correct [182] that in the vast majority of the cases the summary is an accurate reflection of the Board's views?

MR. GOLDBLOOM: Objection. The witness has testified, he has set forth what occurred. If you want to quibble about characterization of these things, that is something else.

MR. SCHAUMBERG: I think "quibble" is an unfortunate word, Mr. Goldbloom. We are here for a very good reason, we're not here to quibble.

MR. GOLDBLOOM: Of course we are.

MR. SCHAUMBERG:

Q My final question relates to the documents which you indicated are on file now in the reading room. If I may draw your attention to Section 1498. of the Board's Regulations, for instance, "Section 1498.6": while I am not either quibbling or arguing with what you have done in this regard, I would nonetheless like to ask you this question:

To the extent that you have published your clearance notices with the deletion of identifying details, have you done anything more than publish the form which appears in 1498.6? In substance, that is?

THE WITNESS:

A I believe that's correct.

Q Would the same be correct with regard to 1498.8, "Letter not to Proceed"?

A I think that is right.

[183] Q Would the same be correct to 1498.7, "Note of Clearance Determination by Regional Board, Class A Case"?

A Correct.

Q Would that be correct with regard to 1498.9, "Order of Regional Board Determining Excessive Profits"?

A I don't know that any of those have occurred recently, because those orders are usually appealed to the Statutory Board.

Q How about 1498.10, "Notice by Regional Board of Order Determining Excessive Profits"?

MR. GOLDBLOOM: Could I go back to the original question that you raised with respect to the series of documents? This is the same question. I'd just like it reread.

MR. SCHAUMBERG: Mr. Chairman, do you recall the question?

THE WITNESS:

A Wait a minute. Now, what's the question?

BY MR. SCHAUMBERG:

Q My question is whether 1498.10, Notice by regional board of order determining excessive profits, is also one of the documents that is now on file with the information previously reported in the form now completed for purposes of deleting identifying details?

A I make the same comment with respect to 1498.10 that I made with respect to 1498.9.

[184] MR. SCHAUMBERG: May I see that list you read from, please?

That is all I have.

MR. GOLDBLOOM: I have about two questions on re-cross.

RE-CROSS EXAMINATION

BY MR. GOLDBLOOM:

Q Where the Board has issued a unilateral order and it is now placed in the library, does this contain the date of the order issued by the Board?

THE WITNESS:

A Yes.
Q Does it contain the amount of dollars involved?
A Yes.
Q In the case where a summary is issued by the Board, either the Statutory or the Regional Board, which culminates in agreement, is it fair to say that the summary has achieved its purpose?
A That is the purpose of the summary.
Q Does the Board know why the contractor may have entered into the agreement?
A We assumed that the contractor agreed because he was persuaded by the summary.
Q Might he have had other reasons for agreeing?
A I don't know. He might have had other reasons.
[185] MR. GOLDBLOOM: I have no further questions.
MR. SCHAUMBERG: Thank you very much, Chairman Hartwig, for submitting to these two days of examination and cross-examination.

(Whereupon, at 7:25 p.m. the deposition was concluded.)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1595-68

GRUMMAN AIRCRAFT ENGINEERING CORPORATION, PLAINTIFF

v.

THE RENEGOTIATION BOARD, DEFENDANT

[Filed, April 26, 1971, James F. Davey, Clerk]

OPINION

I.

The Freedom of Information Act[1] requires the Government to make available to the public "final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases."

In *Grumman Aircraft Engineering Corporation* v. *The Renegotiation Board*, —— U.S.App.D.C. ——, 425 F.2d 578 (1970), the United States Court of Appeals for the District of Columbia held that under the Freedom of Information Act Grumman Aircraft Engineering Corporation (hereinafter "Grumman") was entitled to examine "final orders and opinions" of The Renegotiation Board (hereinafter the "Board") after suitable deletions by the Board to protect confidential information. The case was then remanded to this Court for a determination of whether certain documents sought to be examined by Grumman constituted final orders and opinions.

II.

In its initial application to the Board, Grumman sought opinions and orders issued during the renegotiation of the contracts of fourteen competing companies during

[1] 5 U.S.C. § 552(a)(2)(A) (Supp. IV, 1969).

the years 1962 through 1965, as well as documents concerning its own renegotiations for the year 1965. Following the Court of Appeals decision, the Board furnished to Grumman copies of fifty-one so-called "clearance notices" and two so-called "unilateral orders" which the Board deemed to be the final orders and determinations with respect to the fourteen competitor corporations. Later the Board also furnished certain "performance reports" relating to Grumman and one "statement of facts and reasons" relating to one of the fourteen competing companies involved in renegotiations. Further, it amended its regulations in material respects to allow public access to certain of its records.[2] In light of such action, taken subsequent to the Court of Appeals decision, the Board now asserts that it has fully complied with the mandate and urges that the issues are moot. Grumman, however, takes the position that there are additional documents involved in the renegotiation proceedings involving itself and the fourteen competitor companies which constitute final orders and opinions of the Board.[3] The Board has moved for summary judgment. Grumman has moved for an order "in accordance with the mandate" of the Court of Appeals.

III.

As an aid to the resolution of the issue of what constitutes a final order or opinion the Court granted Grumman permission to depose Mr. Lawrence E. Hartwig, Chairman of The Renegotiation Board, as to the procedures followed by the Board and the type of documentation which pertains to typical renegotiation cases. The gist of Mr. Hartwig's testimony concerning renegotiation procedures[4] follows.

(1) Renegotiation in all cases is initiated at the headquarters of the Board in Washington, D.C. The cases are

[2] 36 Fed. Reg. 3808 (1971), *infra* at 8.

[3] The Grumman demand is detailed *infra* at 9-10.

[4] This general description of procedures paraphrases detailed regulations in 32 C.F.R. §§ 1471-1475.

separated into two casegories, viz., Class A and Class B. A Class B case is one in which the renegotiable profits are less than $800,000. All others are Class A cases.

(2) When a case is filed with the Board it is first considered by the Office of Accounting to check sales, costs, and other accounting factors, and thereafter by the Office of Screening and Exemption. Those cases which appear not to involve excessive profits are screened out at headquarters through this procedure. All other cases are assigned to one of two Regional Boards usually, but not necessarily, on a geographic basis.

(3) A case assigned to a Regional Board is first handled by a two-man team made up of a renegotiator and an accountant. The accountant develops the financial information; the renegotiator develops information concerning contract performance and any other facts which may be of value in arriving at a determination. The team meets with and discusses the case with the contractor and others. When the team has compiled all the necessary information it prepares a Report of Renegotiation which consists of Part 1(a) dealing with the accounting aspects, and Part 2 dealing with the renegotiator's evaluation and recommendation.

(4) The team report is then submitted to the Regional Board.

> (a) In a Class B case the Regional Board, acting under power delegated to it by the Board, either issues a clearance notice or issues a unilateral order determining excessive profits. In the latter case an appeal by an aggrieved contractor lies to the Board in Washington.
>
> (b) In a Class A case at regional level renegotiators recommend to the Regional Board either that clearance issue or that a refund be ordered. The Regional Board, in turn, makes a report and recommendation and transmits the file and report to the Board in Washington which has reserved to itself the authority to handle Class A cases.

(5) In a Class A case in which a Regional Board has recommended a clearance, the file after reaching Wash-

ington is first sent to the Office of Accounting which prepares a memorandum addressed to the Office of Review. In that memorandum the accounting office comments upon the financial report submitted by the regional accountant and indicates whether or not it agrees with the opinion of the accountant at the regional level. The Office of Review in turn assigns a reviewer who indicates his concurrence or disagreement with the recommendation of the Regional Board, and then the Director of the Office of Review indicates his own agreement or disagreement with the Regional Board's conclusions.

The file containing the various staff recommendations is then circulated among the five members of the Board. Any member may, if he wishes, conduct an independent study. Finally, according to Mr. Hartwig, "[W]hen the recommended clearance of the Regional Board comes up on the Board agenda, the Board simply approves or disapproves the clearance. It does not adopt any of the memoranda that are before it." (Tr. at 7)[5]

In the unusual case, however, where the Board has serious questions about the Regional Board's recommendation of clearance, the Board will reassign the case to headquarters and appoint a division of its own members to meet with the contractor and investigate the case further. Once the division is satisfied that a clearance is appropriate, it prepares a report to the Board to this effect. If the Board agrees, it issues a clearance after reassignment notice.

(6) There are two other types of cases which come to Washington after regional consideration, namely (a) a Class B case where a unilateral order determining excessive profits has been issued and the contractor has indicated an appeal, and (b) a class A case where an excessive profits determination has been recommended by the Regional Office.

In such cases the Board appoints a division of its members to meet with the contractor and prepare a report to the full Board setting forth its analysis and recomendation. The case is then put on the agenda for consideration by the whole Board and ultimately is disposed of by

[5] Tr. references are to the Hartwig deposition.

the issuance of a clearance notice or the issuance of a unilateral order of determination of excessive profits. The minutes of the Board do not reflect any discussion or argument--they simply reflect the ultimate disposition of the case.

(7) 50 U.S.C. App. § 1215 provides in part:

> "Whenever the Board makes a determination with respect to the amount of excessive profits, and such determination is made by order, it shall, at the request of the contractor or subcontractor, as the case may be, prepare and furnish such contractor or subcontractor, with a statement of such determination, of the facts used as a basis therefor, and of its reasons for such determination."

This statutory provision is implemented by 32 C.F.R. 1477.2 and 1477.3.

32 C.F.R. 1477.2 involves the case in which an order has issued, and the language of the regulation simply tracks the language of the statute.

32 C.F.R. 1477.3 governs a case in which an order has not issued and it provides in part:

> "When a Regional Board has made a final determination in a Class B case or a final recommendation in a Class A case, or when the Board has made a final determination, and the contractor is unable to decide whether to enter into an agreement for the refund of excessive profits so determined or recommended, the Regional Board or the Board, as the case may be, will furnish the contractor a written summary of the facts and reasons upon which such final determination or recommendation is based in order to assist the contractor in determining whether or not it will enter into an agreement;"

The statement of facts and reasons and summaries of facts and reasons called for by the foregoing are prepared in draft form by the Board's staff and are circulated to each Board member to make whatever changes he wishes before they are finalized. Both are fresh documents in that the various memoranda in the case files are not simply summarized.

It is important to note that in no case does the Board formally adopt reports or recommendations of either the Regional Boards or its staff. It studies and considers but it does not adopt. Mr. Hartwig stated the reasons for this aspect of the Board's procedures:

> "As a practical matter, . . . the Board would never get the job done as expeditiously as Congress intended for it to be done, if a Board agreement had to be secured with respect to every report which is submitted to it. Another reason that the Board operates this way is that this is a judgemental type of operation where Board members may disagree with each other respecting the evaluation of a particular statutory factor; but, nevertheless, can agree on the decision. Frequently it happens in Board discussions that one Board member will emphasize one factor more than another. Or, I know of instances where, upon review of a proposed clearance, an individual Board member might criticize the report of renegotiation because it omitted something. He may even question whether the recommendation incorporated in that report is sufficiently supported in the report itself.
>
> "But when he makes an independent examination of the file he may find, for example, a performance report which convinces him that the recommended clearance is appropriate, even though the particular renegotiator may not have commented favorably on the contractor's performance. This will simply illustrate how these cases come before the Board.
>
> "There may be a case where one Board member will consider that the clearances are justified, clearance is justified, in his own mind, because the overall costs are reasonable. Another Board member might not be impressed by that point, he may consider that perhaps the overall costs are not low costs, but simply reasonable costs, but be more impressed by the contribution to the defense effort than his colleague. Nevertheless, despite the differences in evaluation, they can agree on the result." [Tr. at 150-151]

IV.

As noted above, subsequent to the decision of the Court of Appeals, and while this matter was pending before this Court, the Board, under date of February 24, 1971, amended its regulation 32 C.F.R. § 1480.5 to provide as follows:

> "(a) *Records available for inspection.*
> Pursuant to 5 U.S.C. 552(a)(2), the Board will make available for public inspection and copying, the following records:
>
> (1) Agreements determining excessive profits.
> (2) Orders determining excessive profits.
> (3) Statements of facts and reasons issued by the Board.
> (4) Letters not to proceed.
> (5) Clearances after assignment.
> (6) Clearances without assignment (express Board Action).
> (7) Clearances without assignment (pursuant to delegation of authority).
> (8) Decisions on applications for commercial exemption.
> (9) Decisions on new durable productive equipment exemption.
> (10) Decisions on applications for stock item exemption.
> (11) Special accounting agreements.
> (12) Interpretations.
> (13) General Orders that affect the public.
> (14) Administrative Orders that affect the public
>
> "Without regard to the provisions of 5 U.S.C. Section 552(a)(2), the Board will also make available for public inspection and copying summaries of facts and reasons issued by the Board." 36 Fed. Reg. 3808 (1971).

So,

(1) the Court of Appeals having determined that a statement of facts and reasons is a final

order (as amended 32 C.F.R. 1480.5 (1)(a) (3) now provides); and

(2) the Board having made available to Grumman certain performance reports and unilateral orders; and

(3) the Board having made provision in 32 C.F.R. 1480.5 (1)(a) for the production of summaries of facts and reasons "without regard to the provisions of 5 U.S.C. Sec. 552 (a)"

the Board now alleges full compliance with the mandate of the Court of Appeals and the provisions of the Freedom of Information Act.

But Grumman insists that final opinions and orders of the Board embrace at least the following:

"(1) Any 'Statement of Facts and Reasons' furnished pursuant to 32 C.F.R. § 1477.2 and Section 105(a) of the Renegotiation Act of 1951 (50 U.S.C. App. § 1215(a)).

"(2) Any 'Summary of Facts and Reasons' prepared pursuant to 32 C.F.R. § 1477.3 when no 'Statement of Facts and Reasons' was subsequently furnished.

"(3) Any report and 'recommendation' prepared by a division of The Renegotiation Board pursuant to 32 C.F.C. § 1472.4(d) which does not result in a clearance and when no 'Statement of Facts and Reasons' or 'Summary of Facts and Reasons' was subsequently furnished.

"(4) Any 'report' prepared by a Regional Board pursuant to 32 C.F.R. § 1473.3(a) which results in a clearance.

"(5) Any report and 'recommendation' prepared by a division of The Renegotiation Board pursuant to 32 C.F.R. § 1472.4(d) which results in a clearance.

"(6) Any concurring or dissenting document prepared with respect to (1) through (5) above."

V.

We discuss each of the Grumman claims below.

(1) *Statement of Facts and Reasons*

The Court of Appeals specifically declared that such documents were final opinions of the Board and subject to disclosure under the Freedom of Information Act. *Grumman Aircraft Engineering Corp.* v. *The Renegotiation Board*, *supra*, at 579 n. 2. Accordingly, we need not discuss it further.

(2) *Summary of Facts and Reasons*

A summary of facts and reasons is furnished when a final determination of excessive profits has been made by the Board (or a Regional Board) and the contractor is unable to decide whether to enter into agreement for a refund. If the contractor refuses to enter into such an agreement a unilateral order determining excessive profits is issued.

In its amended regulation 32 C.F.R. 1480.5 (*supra*) the Board made these summaries available to the public without, however, conceding the compulsion of the Freedom of Information Act. The Board takes the position that the unilateral orders issued in the pertinent cases, and not summaries of facts and reasons furnished pursuant to 32 C.F.R. 1477.3 are the final opinions and orders of the Board.

It is to be noted that 32 C.F.R. §1477.3 used the word "final" in at least four places in describing the procedures for providing the contractor with a summary of facts and reasons, i.e.

> "When a Regional Board has made a *final* determination in a Class B case or a *final* recommendation in a Class A case, or when the Board has made a *final* determination, ... the Regional Board or the Board . . . . will furnish the contractor a written summary of the facts and reasons upon which such *final* determination or recommendation is based . . ." [emphasis supplied]

Further, it is to be noted that 32 C.F.R. 1477.4 which enumerates the items to be included "in every statement or summary furnished" makes no distinction between the two types of documents. It follows that if statements of facts and reasons are final opinions (and the Court of Appeals has so held) then clearly summaries of facts and reasons are also final opinions. To claim otherwise would fly in the face of the language of the regulations and the practical effect of the documents.

Chairman Hartwig said that the summary of facts and reasons "constitutes the Board's exposition of the case" but he maintained that it was not a final exposition because it was subject to change. (Tr. at 110) The Chairman's position, however, is unrealistic. Changes occur only in a "small minority of cases" (Tr. at 182) and in those the changed summary would logically become the final opinion.

Clearly a summary of facts and reasons expresses the Board's conclusions as to why and in what manner the contractor realized excessive profits. A unilateral order without a summary of facts and reasons would be meaningless and useless. It would tell nothing to a contractor and the public.

Accordingly, the Court holds that a summary of facts and reasons is a final opinion of the Board and available to the public under the Freedom of Information Act without reservation in all cases in which neither a statement of facts and reasons nor a modified summary is subsequently issued. In those few cases where the summary of facts and reasons is changed, the modified summary constitutes the final opinion of the Board and must be made available to the public.

(3) *Division Report and Recommendation—Excessive Profits Determination*

Once a Regional Board has recommended a determination of excessive profits in a Class A case, the Board designates a division of its members to consider the case. After studying the various memoranda, the division files with the whole Board its report and recommendation which includes a consideration of the statutory

factors laid out in 32 C.F.R. § 1460.9-1469.14. 32 C.F.R. § 1472.4(d).

If one of the division's members disagrees with the report and recommendation he may file a dissenting memorandum. The report and recommendation, as well as the dissent, is then discussed by the full Board and if the Board agrees with the division a unilateral order of excessive profits is issued.

During his deposition Chairman Hartwig, in discussing this tpye of case, claimed that only the recommendation of the division but not its report was approved by the Board and that each member had his own reasons for the final action taken by the full Board, i.e., he claims the unilateral order is the Board's final exposition.

However, it appears to the Court that in this type of case the division report rather than the unilateral order is the crucial and final document. The report contains a consideration of the statutory factors, explains the reasons for the division's recommendation, and gives the facts on which that reasoning rests. This is the essence of a final opinion.

It is unrealistic to claim that because Board members might have different reasons for approval of the division's recommendation, the report of the division upon which its recommendation is based is not a final opinion. It is in fact the last document which explains reasons for the Board's decision. The report often reflects the views of a majority of the five Board members. But at the very least it reflects the analysis of one member and would thereby constitute a concurring opinion which under the Freedom of Information Act is included within the term final opinion.[6] If Board members have differing rationale for approval of the division's recommendation, they may state it in concurring opinions or memoranda.

Accordingly, the Court concludes that where neither a statement of facts and reasons nor a summary of facts

[6] The Freedom of Information Act specifically included "dissenting and concurring opinions" under its definition of "final opinion" so that "if one or more agency members dissent or concur, the public and the parties" will "have access to these views and ideas." S. Rep. No. 813 89th Cong., 1st Sess. 7 (1965)

and reasons is issued, the report and recommendation of the division of the Board, together with any dissenting or concurring memoranda, constitutes the Board's final opinion and is available to the public under the Freedom of Information Act.

(4) *Clearance—Report of Regional Board*

When a case assigned to the Regional Board has been investigated and the Regional Board has submitted its report to the Board recommending clearance, the Board after considering all the information in the file either approves or disapproves. If it approves the recommendation the clearance notice is issued by the Regional Board.

This clearance is a decision of the Regional Board in a Class A case unless the Board is not in accord. The clearance notice is signed and issued by the Chairman of the Regional Board and states:

> "This determination has been made by this Regional Board pursuant to the due delegation of authority and The Renegotiation Board has advised the Regional Board that it is in accord with this determination." 32 C.F.R. § 1498.6(a).

The notice further states that it

> "shall constitute *final* action by the Government with respect to renegotiation pursuant to the Act for the fiscal year under review." [emphasis supplied] 32 C.F.R. § 1498.6(a).

Regional Board reports apply the statutory factors outlined in 32 C.F.R. §§ 1460.9-1460.14, are prepared and signed by a Regional Board member, and are signed on behalf of the Regional Board by its Chairman.

Such a report gives the facts and reasons for the Regional Board's recommendation and it is that recommendation which is approved by the Board. Here again a clearance notice by itself is meaningless. In order for the public to be fully informed, the reasons behind the clearance notice must be made available and in this type of case such facts and reasons are found in the Regional Board's report.

Accordingly, the Court concludes that a Regional Board report which results in a clearance notice constitutes the final opinion of the Board in a clearance case of this nature and must be made available to the public under the Freedom of Information Act.

(5) *Clearance—Division Report and Recommendation*

When the Board has reassigned a case to headquarters because it questions the Regional Board's recommendation for clearance, the Board appoints a division of its members to investigate the case and prepare a report for the Board. If the report recommends clearance and the Board agrees that it is appropriate, a clearance after reassignment notice is issued by the Board.

This procedure is similar to a determination by the Board that excessive profits have been realized. The reasoning of the Court applied to that situation, *supra*, applies equally well in this instance. The division report is prepared by a member of the Board. It is the final Board document which lays out reasons for the Board's actions.

It usually represents the reasons why at least a majority of the Board decided clearance should issue. If not specifically adopted by a majority of the Board, it at least represents one member's analysis of the issues and reasons for deciding that a clearance notice should issue and would be a concurring opinion.

Accordingly, the Court holds that a report and recommendation of a division which results in a clearance after reassignment notice constitutes a final opinion within the meaning of the Freedom of Information Act and must be made available to the public.

VI.

To recapitulate, what the Court considers a final opinion is that document which states conclusions and reasons upon which the Board has acted as well as any dissents and concurrences thereto. Depending on the circumstances of any given case that document may be a summary of facts and reasons when no subsequent statement of facts and reasons is prepared; or it may be a

report and recommendation of a division which does not result in a clearance and when neither a statement of facts and reasons, nor a summary of facts and reasons is prepared, or it may be the report of a Regional Board which results in a clearance, or it may be the report and recommendation of a division which results in a clearance. The essential factor is whether or not it represents the final conclusion and reasoning on which the final determination of the Board is based.

VII.

There is a statutory exemption in the Freedom of Information Act which protects trade secrets and commercial or financial information obtained from a person which is privileged or confidential.[7] The Court of Appeals in *Grumann* v. *The Renegotiation Board*, *supra*, at 581, discussed this exemption and noted that final orders and opinions should only be made available after confidential detail has been deleted. The holding of this Court as to what constitutes final opinions and orders in this particular instance must, of course, be read in the light of that statutory exemption.

VIII.

Collateral to the issues in this case the Court's attention has been called to the fact that when the Board does make information public it does so through an indexing system which makes it extremely difficult for the public to locate and identify desired information. This Court does not claim any expertise in the matter of indexing, but it does suggest that in connection with information required to be made available, the Board should use its best efforts to make the information easily available through a simplified indexing system.[8]

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[7] 5 U.S.C. § 552(b)(4) (Supp. IV, 1969).

[8] Counsel for Grumman suggested the Standard Industrial Classification Code which the Board used previously in making information available to Congress. See Joint Committee on Internal Revenue Taxation Report on The Renegotiation Act of 1951, H.R. Doc. No. 332, 87th Cong., 2nd Sess. Appendix C, 81-97 (1962).

Counsel for plaintiff will submit an appropriate order within ten days.

/s/ [Illegible]
JUDGE

Dated: April 26, 1971.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1595-68

GRUMMAN AIRCRAFT ENGINEERING CORPORATION,
PLAINTIFF

v.

THE RENEGOTIATION BOARD, DEFENDANT

MOTION FOR REHEARING

Comes now defendant, by its undersigned attorneys, and respectfully moves the Court for a rehearing pursuant to Rule 59, Federal Rules of Civil Procedure, for the purpose of considering a Claim of Executive Privilege asserted by defendant against the disclosure to the public of Division Reports and Recommendations and Reports of Renegotiation, as described in this Court's Opinion of April 26, 1971.

In support of this motion, the Court is respectfully referred to the Affidavit and Claim of Privilege attached hereto and to the Memorandum of Points and Authorities filed herewith.

Respectfully submitted,

L. PATRICK GRAY, III
Assistant Attorney General

HARLAND F. LEATHERS

IRWIN GOLDBLOOM
Attorneys, Department of Justice

Attorneys for Defendant

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1595-68

GRUMMAN AIRCRAFT ENGINEERING CORPORATION,
PLAINTIFF

v.

THE RENEGOTIATION BOARD, DEFENDANT

AFFIDAVIT AND CLAIM OF PRIVILEGE

I, Lawrence E. Hartwig, being duly sworn, deposes and says:

1. I am the Chairman of the Renegotiation Board, an independent agency within the executive branch of the Government, and as such am familiar with the policies, regulations, operations and procedures of the Board. I have examined the opinion of the United States District Court for the District of Columbia in this action which was filed April 26, 1971.

2. The court held in that opinion, *inter alia*, that under certain circumstances Division Reports and Recommendations and Reports of Renegotiation prepared in a Regional Renegotiation Board constituted final opinions of the Renegotiation Board within the meaning of the Freedom of Information Act, 5 U.S.C. 552, and should therefore be made available to the public.

3. Such Division Reports and Recommendations and Reports of Renegotiation are internal records of the Renegotiation Board which are prepared for and designed to assist the members of the Board in their deliberations. They are intra-agency memoranda and communications consisting of advisory opinions, conclusions, recommendations, and analyses prepared by staff personnel or members of a Division of the Board which the entire Renegotiation Board uses for the purposes of discussion and consideration in arriving at a conclusion as to the existence of excessive profits in a given case. The release of

the content of such documents to the public would be injurious to the public interest since, if the Renegotiation Board is to receive frank recommendations and suggestions from its staff and members, the Division Report and Recommendation and Report of Renegotiation must be immune from public disclosure. Any impairment of the free flow of comments, recommendations and suggestions by personnel on the staff or members of the Board to the Board, acting as a body, would adversely affect the ability of the Renegotiation Board to carry out its mandate under the Renegotiation Act. In addition, since the Renegotiation Board, acting as a body, does not adopt the contents of the Division Reports or the Reports of Renegotiation which are submitted to it for its consideration in determining the existence of excessive profits, the release of the contents of such documents to the public would be injurious to the public interest since it might misinform the public as to the grounds on which the Renegotiation Board, acting as a body, made a determination.

4. Accordingly, in the exercise of my responsibilities as Chairman of the Renegotiation Board, I therefore respectfully assert executive privilege as the ground for the nondisclosure of such Division Reports and Recommendations and Reports of Renegotiation.

/s/ Lawrence E. Hartwig
LAWRENCE E. HARTWIG

Subscribed and sworn to before me, a notary public in and for the District of Columbia, on this 17th day of May 1971.

Signed: Helen V. Allen
Notary Public

My commission expires
May 14, 1974

[SEAL]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1595-68

GRUMMAN AIRCRAFT ENGINEERING CORPORATION,
PLAINTIFF

v.

THE RENEGOTIATION BOARD, DEFENDANT

OPPOSITION TO DEFENDANT'S MOTION FOR REHEARING

Plaintiff, Grumman Aircraft Engineering Corporation, hereby opposes defendant's motion for rehearing on the grounds that defendant has not raised any reason "for which rehearings have heretofore been granted in suits in equity" pursuant to Rule 59(a)(2) F.R.C.P. and on the grounds that the granting of this motion after this Court has rendered its opinion would encourage endless litigation by allowing the defendant to raise a theory previously available but not asserted after determination that the defense theory in fact asserted was as a matter of law not a defense.

In support of this motion, the Court is respectfully referred to the Memorandum of Points and Authorities filed herewith.

Respectfully submitted,

TOM M. SCHAUMBERG
REXFORD T. BROWN

Attorneys for Plaintiff
GADSBY & HANNAH

Of Counsel:

GADSBY & HANNAH

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1595-68

GRUMMAN AIRCRAFT ENGINEERING CORPORATION,
PLAINTIFF

v.

THE RENEGOTIATION BOARD, DEFENDANT

ORDER

This matter having come before the Court on remand from the United States Court of Appeals for the District of Columbia Circuit and the Court having considered defendant's motion for summary judgment, plaintiff's motion for an order in accordance with the mandate of the Court of Appeals, the other pleadings and briefs filed herein, the affidavit and deposition of Lawrence E. Hartwig, Chairman of the defendant, having heard argument of counsel, and in accordance with the opinion of this Court filed April 26, 1971, it is hereby

ORDERED this 7th day of June, 1971, that:

1. The Renegotiation Board ("Board") shall make available for public inspection and copying its final opinions and orders, including determinations, unilateral orders, agreements, clearance notices and letters not to proceed.

   (a) As used herein, the term "final opinion" means that document which states conclusions and reasons upon which the Board has acted in carrying out its statutory mandate as well as any dissents and concurrences thereto, including:

      i. Any "Statement of Facts and Reasons" furnished pursuant to 32 C.F.R. § 1477.2 and Section 105(a) of the Renegotiation Act of 1951 (50 U.S.C. App. § 1215(a)).

      ii. Any "Summary of Facts and Reasons" prepared pursuant to 32 C.F.R. § 1477.3 when no "Statement of Facts and Reasons" was subsequently furnished.

      iii. Any report and "recommendation" prepared by a division of the Renegotiation Board pursuant to 32 C.F.R. § 1472.4(d) which does not result in a clearance and when no "Statement of Facts and Reasons" or "Summary of Facts and Reasons" was subsequently furnished.

      iv. Any "report" prepared by a Regional Board pursuant to 32 C.F.R. § 1473.2 (a) which results in a clearance.

      v. Any report and "recommendation prepared by a division of the Renegotiation Board pursuant to 32 C.F.R. § 1472.4(d) which results in a clearance.

      vi. Any concurring or dissenting document prepared with respect to (i) through (v) above.

   (b) To the extent required to prevent a clearly unwarranted invasion of personal privacy such as disclosure of the source of date which falls within the exemption provided by 5 U.S.C. § 552(b)(4), the Board may delete identifying details when it makes its final opinions and orders available for public inspection and copying. In each case the justification for the deletion shall be fully explained in writing.

2. In accordance with Paragraph 1, above, the Board shall, within thirty (30) days of the entry of this Order, make available for public inspection and copying the final opinions and orders issued for the renegotiable years 1962 through 1965 involving the following companies:

   Douglas Aircraft Company
   The Boeing Company
   Lockheed Aircraft Corporation

Ling-Temco-Vought, Inc.
North American Aviation, Inc.
Fairchild Hiller Corporation
Republic Aviation Corporation
Martin Marietta Corporation
General Dynamics Corporation
McDonnell Company
Northrup Corporation
Bell Aerospace Corporation
Litton Industries, Inc.
Avco Corporation

3. The Board shall forthwith amend its Regulations, Title 32, Chapter XIV, Subchapter B, Part 1480, Code of Federal Regulations, to conform with the provisions of this Order.

/s/ [Illegible]
Judge
United States District Court

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 1595-68

GRUMMAN AIRCRAFT ENGINEERING CORPORATION,
PLAINTIFF

vs.

THE RENEGOTIATION BOARD, DEFENDANT

[Filed Jun. 15, 1971, James F. Davey, Clerk]

ORDER

Upon consideration of the defendant for rehearing filed herein, May 18, 1971 it is this 15th day of June, 1971,

ORDERED that the Motion be and the same hereby is denied.

JAMES F. DAVEY
Clerk

By /s/ Linda L. Payne
Deputy Clerk

HOWARD F. CORCORAN
Presiding Judge

CO-550
Rep 12/70

Copy to:

Tom M. Schaumberg
1700 Pennsylvania Ave., N.W.
Washington, D.C. 20006

Irwin Goldbloom
Rm. 3623
Department of Justice
Washington, D.C.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1595-68

GRUMMAN AIRCRAFT ENGINEERING CORPORATION,
PLAINTIFFS

v.

THE RENEGOTIATION BOARD, DEFENDANTS

MOTION FOR STAY

Defendant, by its undersigned attorneys, respectfully moves for a stay pending final resolution of any appeal which may be taken from the Order of this Court dated June 7, 1971.

The basis for this motion is that compliance with the Court's Order would, within the time allotted therein, *inter-alia*, moot any appeal which might be taken therefrom.

For these reasons, the defendant respectfully urges the Court to stay the effectiveness of its Order of June 7, 1971.

Respectfully submitted,

L. PATRICK GRAY, III
Assistant Attorney General

HARLAND F. LEATHERS

IRWIN GOLDBLOOM
Attorneys, Department of Justice
Attorneys for Defendant

No objection:

TOM M. SCHAUMBERG
GADSBY & HANNAH
1700 Pennsylvania Ave., N.W.
Washington, D.C. 20006

ORDER

Upon consideration of the foregoing motion, and it appearing that plaintiff has no objection thereto, the Order of this Court dated June 7, 1971, be and it is hereby stayed pending the final resolution of any appeal which may be taken therefrom.

D to: ———

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1595-68

GRUMMAN AIRCRAFT ENGINEERING CORPORATION,
PLAINTIFF

v.

THE RENEGOTIATION BOARD, DEFENDANT

NOTICE OF APPEAL

Notice is hereby given that The Renegotiation Board, defendant in this proceeding, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the order filed in this action on June 7, 1971.

IRWIN GOLDBLOOM
Attorney, Department of Justice

Attorney for Defendant

SUPREME COURT OF THE UNITED STATES

No. 73-1316

THE RENEGOTIATION BOARD, PETITIONER

v.

GRUMMAN AIRCRAFT ENGINEERING CORPORATION

ORDER ALLOWING CERTIORARI—Filed May 28, 1974

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is set for oral argument in tandem with No. 73-1233.

Mr. Justice Powell took no part in the consideration or decision of this petition.

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